VOL. XV. **1892.**

THE

MYSORE LAW REPORTS.

CONTAINING

CASES DETERMINED BY THE CHIEF COURT OF MYSORE, THE COURT OF THE JUDICIAL COMMISSIONER OF COORG

AND

THE COURT OF THE BRITISH RESIDENT IN MYSORE.

EDITED BY

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Law Editor to the Mysore Government.

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JUDGES OF THE CHIEF COURT.

CHIEF JUDGE:

T. R. A. Thumboo Chetty.

A. Ramachendra Iyer (*Offg.*)

JUDGES:

A. Ramachendra Iyer.

P. N. Krishna Murti.

C. Meenacshaya (*Offg.*)

LAW OFFICERS:

C. Meenacshaya, *Government Advocate.*

S. Ramaswami Iyer, { *Asst. Government Advocate and Government Prosecutor.*

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THE

MYSORE LAW REPORTS.

APPELLATE CIVIL.

SECOND APPEALS.

Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

VENKATRAMANIAH (DEFENDANT NO. 3) *v.* M. D. NARNIENGAR (PLAINTIFF)* 1892 *May* 27.

AND

VENKATRAMANIAH (DEFENDANT NO. 3) *v.* M. D. NARNIENGAR (PLAINTIFF).*

Punnay lands—Rights of Inamdar—Mortgage by Inamdar, effect of —Extinguishment of tenant's rights—Second mortgage—Right of redemption—Marshalling Securities.

Punnay land means land which is absolutely at the disposal of the Inamdar, or land in which another person has not acquired a right of occupancy by law or custom.

If a tenant having a right of occupancy surrenders his right or it is otherwise extinguished, the entire estate vests in the landlord; and the land becomes absolutely at his disposal.

A mortgage by an Inamdar without any reservation of right in his own favour, transfers to the mortgagee all rights the mortgagor is capable of transferring.

The defendant, who purchased the garden at sale in execution of a mortgage-decree obtained by himself and the land at sale in execution of a money-decree, against the Inamdar, sought to be allowed to redeem the first mortgage (at sale in execution of decree upon which the plaintiff purchased) in case the plaintiff's claim for possession should be upheld.

Held, that, on sale of the property under the first mortgage, the defendant ought to have protected his interests by seeking an order that the first mortgagee should resort primarily to the mort-

*Appeals Nos. 111 and 112 of 1891 against appellate decrees Nos. 41 and 42 of 1891 of Mr. C. Sreenivasiengar, District Judge of Mysore, reversing decrees Nos. 698 and 1045 of 1890 of Mr. C. B. Seshagiri Row, Munsiff of Seringapatam.

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gaged property other than the garden: the defendant not having done this and the first mortgagee having executed his decree and acquired a valid title by purchase, the latter cannot be compelled to submit to partial redemption. As to the land (which was not mortgaged to him) the defendant ought to have asserted his rights when the first mortgagee's decree was under execution; that decree having been executed he has now no right, any more than the mortgagor himself, to seek partial redemption.

These were suits for possession by the purchaser of an Inam village, Kundoor, at a sale held in execution of a decree on a mortgage made by the Inamdar. The first suit was for a garden and the second for *punnay* lands situated in the village.

The Munsiff dismissed the suits, holding that the Inamdar had only the right to collect assessment on the lands and that such right only had been transferred to the mortgagee and to the plaintiff as purchaser at the court sale.

On appeal, the District Judge reversed this finding and decreed both suits for possession with costs.

The defendant appealed to the Chief Court.

Mr. *L. Srinivasa Iyengar* for the appellant.

Mr. *S. Ramaswamy Iyer* for the respondent.

The facts of the case and the nature of the contention sufficiently appear in the judgment of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) which was as follows :—

The Inam village of Kundoor was mortgaged in 1869 to Gurikar Mallaya. His widow filed O. S. No. 286 of 1882 against the mortgagor (Inamdar) and got a decree for money and for sale of the village. The village was sold in July 1889 and the plaintiff became the purchaser. He filed two suits for possession of a garden and *punnay* lands situated in the village.

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The defendant contended that the garden and *punnay* lands were not mortgaged to Mallaya; that, if they were included in the mortgage, the Inamdar (mortgagor) had only a right to levy the assessment on the said lands; that the plaintiff acquired this right alone; and that the suit for possession was not maintainable.

The Munsiff of Seringapatam found that what was mortgaged to Mallaya was the right possessed by the mortgagor as Inamdar and that as Inamdar the right which he transferred to the mortgagee was the right he had to collect the *beriz* or assessment on the *punnay* lands. He found that the plaintiff was entitled to the assessment only and that the suit for possession must fail. The District Judge of Mysore dissented from the Munsiff's finding on the question of an Inamdar's right in *punnay* lands and decreed the suit for possession.

The defendant contends in second appeal that the finding of the Munsiff ought to prevail. We are unable to agree in this contention. We do not agree in the Munsiff's opinion that an Inamdar who has *punnay* land in his village fills two different capacities or, in other words, that he ought to be regarded as two distinct persons, and that he is a tenant with a right of occupancy bound to pay assessment to himself in his capacity of Inamdar or superior landholder. *Punnay* land means land which is absolutely at the disposal of the Inamdar, or land in which another person has not acquired a right of occupancy by law or custom. If a tenant having a right of occupancy surrenders his right or if his right is otherwise extinguished, the entire estate

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vests in the landlord; the land is absolutely at his disposal, and he may create any fresh right at his pleasure to retain the whole in his possession. It is not correct to say that he succeeds to the right of the tenant, and that he is both a superior and inferior holder. It is more correct to say that the inferior right being extinguished, the full right of the superior holder is revived. The Inamdar's right to alienate *punnay* land being unlimited, we must hold that when he mortgaged the village in 1869 without making any reservation of right in his favor, he transferred to the mortgagee all rights which he was capable of transferring. For these reasons, we agree with the District Judge in holding that the plaintiff purchased not merely the right to collect the *beriz* but the right to possession of *punnay* lands.

The appellant contends that he ought to be allowed to redeem the first mortgage in case we uphold the claim for possession. The facts upon which this contention is made are as follows:—The garden which was mortgaged to Mallaya in 1869 was subsequently mortgaged to this defendant in 1879. He sued the mortgagor and got a decree for money and for sale of the property. He applied for sale and himself purchased the garden. The land in suit was not mortgaged to the defendant. He purchased it in execution of a money-decree which he had obtained against the Inamdar.

We are of opinion that the defendant's contention is not well founded. The first mortgagee Mallaya had a right to bring the property to sale and his right was unaffected by the subsequent mortgage made to the defendant. The second mortgagee

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who was in possession of a portion of the property which had been mortgaged to Mallaya, might have protected his interests by praying the court to direct Mallaya to sell in the first instance the property other than the garden and, if that was not sufficient to discharge the debt, then and then only to sell the garden. He having taken no steps to protect his interests, and the first mortgagee having executed his decree and having acquired a valid title to the village by purchase, we do not see how we can now interfere on behalf of the second mortgage, and compel the first mortgagee to submit to partial redemption.

The land not being mortgaged to the defendant, he was bound by the decree which had been passed against the mortgagor; and if he wished to protect his interests, he must have asserted his right when Mallaya's decree was under execution. The decree having been executed he has no right, any more than the mortgagor himself, to pray for permission to make a partial redemption. We confirm the District Judge's decrees and dismiss the second appeals with costs.

Appeal dismissed.

Before A. Ramachendra Iyer and P. N. Kristna Murti, Judges.

GUNGAPPA (PLAINTIFF) v. HANUMANTAYYA AND OTHERS (DEFENDANTS).*

1892 *June* 1.

Lease—Wrongful possession—Collusion—Irrelevant issues—Finding without framing issue—Prejudice.

The plaintiff sued to recover property which he alleged was wrongfully taken possession of by the 2nd, 3rd and 4th defendants

* Appeal No. 107 of 1891 against appellate decree No. 20 of 1891 of Mr. C. Cress, District Judge of Nagar, affirming decree No. 263 of 1890 of Mr. U. Mungapathi Naidu, Munsiff of Chittaldroog.

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from his lessee, the 1st defendant; the only questions for decision were whether the lease was *bonâ fide* and whether wrongful possession was obtained from the lessee.

The plaintiff was entitled to sue and did sue in his own name and not on behalf of his family (of which he is but a junior member) for any declaration of their rights: therefore the issues raised and decided as to adoption, division and family rights are irrelevant and unnecessary.

Issues were not framed on the question of lease and possession, but the judgments of the lower courts contain what are equivalent to concurrent findings on these points. As the plaintiff showed by his grounds of appeal to the District Judge that he was not prejudiced by the omission to frame specific issues but well knew what he had to prove and was prepared to stand or fall by the evidence on record, these findings must be taken as binding on him.

This was a suit to recover possession of one-fourth share of certain lands and for kundayem and value of produce. The plaintiff alleged that being entitled to one-fourth part of the lands, the other three-fourths of which belonged to the 2nd, 3rd and 4th defendants, he on the 8th July 1889 leased his one-fourth share to the first defendant; that the 2nd, 3rd and 4th defendants in collusion with the 1st defendant obtained wrongful possession of the leased land, appropriated the produce and kept him out of possession.

The Munsiff ordered ten other persons whom he considered to be interested in the land to be added as supplemental defendants, and framed the following issues:—

1. Whether the suit is bad for misjoinder of causes of action?

2. Whether the disputed one-fourth share of the lands fell to Muddiyappa and Dodda Basappa's share in the family division and subsequently was inherited and held by Muddiyappa?

3. Whether the land was enjoyed and held by Dodda Basappa and 3rd defendant during the last forty years?

4. Whether the third defendant was adopted by Dodda Basappa?

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5. What crops were raised on these lands, and what is the value of the plaintiff's or landlord's share of the same as per lease or otherwise?

The Munsiff found the 1st issue in favor of the plaintiff, the 2nd and 3rd against him, the 4th against the 3rd defendant, and left the last issue undecided as unnecessary. He dismissed the suit, "the plaintiff's claim to the land not having been proved;" "and the 3rd defendant's possession being long anterior to the lease, and unaffected by it."

On appeal the District Judge also dismissed the suit holding that "the 3rd defendant's long possession gives him a right to hold the land until ousted by some one with a better title which the plaintiff does not prove that he possesses."

In regard to the lease, the District Judge observed:—

"The apparently collusive execution of the lease by the first defendant in favor of the plaintiff cannot affect the third defendant's rights."

The plaintiff appealed to the Chief Court. In the prayer of his appeal-petition he asked, *inter alia*, that the suit might be remanded for the raising of proper issues and for recording findings on all the issues framed.

Mr. *D. Vekataramiah* for the appellant.

Mr. *S. Nanjappah* for the respondent.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows:—

The plaintiff alleged that he had leased the land in suit to 1st defendant, and that that defendant and defendants 2, 3 and 4 had colluded together and refuse to deliver possession to him.

The only question which the court below had to

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try was whether there was a *bonâ fide* lease and whether the defendants 2, 3 and 4 had wrongfully obtained possession from the lessee. The questions of law and fact which were discussed by the Munsiff and by the District Judge were not relevant to the question in issue, and ought not to have been discussed at all. The question of the title of the plaintiff's family to the land in suit ought not to have been raised in this suit. The plaintiff who was but a junior member of his family had no right to represent the family, *i. e.*, to institute a suit on behalf of his father and brother and to bind them by his action. If it was a suit by the family to have its rights declared and ascertained, it ought to have been filed by the plaintiff and by his father and brother. Since it was not so filed, the questions of third defendant's adoption, division and of the rights of plaintiff's branch of the family were wholly extraneous to the point in issue. If the lease was true, the plaintiff was entitled to sue in his own name and it was upon this ground alone that he sued and this was the only question for adjudication. We regret that this point was not steadily kept in view, and that unnecessary issues were framed, and that a simple case was complicated thereby.

Although the Munsiff did not frame an issue as to the question of lease and possession thereunder, he found upon the evidence that the third defendant's possession was long anterior to the lease and that it was not affected by it. Whether in the absence of an issue on the point, this finding was sufficient to bind the plaintiff might be open to doubt, if he did not show by his grounds of appeal to the District

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Judge that he was not prejudiced by the omission, and that he well knew what he had to prove. The second ground of his appeal was to the effect that the evidence was abundant to prove that there had been a lease and that defendants 2, 3 and 4 had subsequently taken wrongful possession. As he was prepared to stand or fall by the evidence on record, we must hold that he had no more evidence to adduce. The District Judge found that the lease was collusive and that it could not prejudice the right of third defendant. There being a concurrent finding upon a question of fact and this question being the only question for adjudication in the suit, we hold that the decree dismissing the suit was right. We confirm the decree and dismiss the second appeal with costs.

Appeal dismissed.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

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LINGANNA (DEFENDANT No. 2) v. GURU SIDDAPPAH (PLAINTIFF).*

Sale of mortgaged property by mortgagor after decree on mortgage—Liability of purchaser to decree-holder—Remedy of decree-holder for acts of purchaser tending to waste or diminish security—Second suit for damages—Civil Procedure Code (Act XIV of 1882) s. 268—Purchaser, representative of judgment-debtor for purposes of execution—Conversion of suit for damages into one for declaration—Direction in decree that plaintiff should proceed in execution.

The plaintiff having obtained a decree on a mortgage, his judgment-debtor subsequently sold a portion of the mortgaged property to *L.* The plaintiff then filed a second suit against his judgment-debtor and *L* for damages on the allegation that they had by collusion and fraud, carried away the materials of a house and granary subject to the mortgage, thereby preventing the execution

* Appeal No. 121 of 1891 against appellate decree No. 38 of 1891 of Mr. C. Cress, District Judge of Nagar, modifying decree No. 221 of 1890 of Mr. B. Vencata Char, Munsiff of Yedahalli.

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of his decree or diminishing his security. A decree was given by the court of first instance upon which the District Court, in appeal, ordered no execution should issue, but that it should be viewed only as a declaratory decree; and directed the plaintiff to take out execution of his original decree under section 268 of the Code of Civil Procedure.

Held by the Chief Court, on second appeal, that when a mortgagee has obtained a decree against the mortgagor and the mortgaged property, if a third person voluntarily purchases the property from the mortgagor and if he destroys it or wastes it or otherwise diminishes the value of the security, such third person is a representative of the mortgagor for the purpose of execution of the mortgagee's decree: and the question of damages or compensation is one which ought to be determined in execution and not by a fresh suit. *Further* (*a*) that the District Judge had no power to convert a suit for damages into one for declaration of title; (*b*) that when the plaintiff was in a position to sue for consequential relief and he did in fact sue for damages there were no grounds at all for making a decree for a bare declaration; (*c*) that the decree ought not to contain a direction that the decree-holder should take proceedings in execution under the Code of Civil Procedure; and on these grounds alone the decree of the District Judge might properly be reversed and the suit be dismissed.

This was a suit in which the plaintiff sought to recover Rs. 550 damages against the defendants for having fraudulently and collusively, under cover of a sale by the first defendant to the second defendant, carried away the materials of a house and granary, portion of property subject of a mortgage by the first defendant to the plaintiff, and in respect of which the plaintiff held a mortgage decree.

The Munsiff gave a decree for Rs. 400 which he found to be the value of the property, against both defendants, holding they were acting in collusion.

The District Judge held that a second suit would not lie at the instance of the plaintiff against the first defendant who was already his judgment-debtor on the mortgage decree in respect of the same property, and

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that the plaintiff ought to have attached the property in execution of his previous decree under section 268 (*c*) of the Civil Procedure Code, in the hands of the second defendant. But instead of dismissing the suit, the District Judge ordered that the decree of the Munsiff should be considered only as a declaratory decree and that no execution should issue under it and directed the plaintiff to take proceedings in execution of his previous decree in respect of the property subject of the present suit.

The second defendant appealed; and the plaintiff at the suggestion of the Chief Court also preferred a second appeal against the District Judge's decree. Both appeals were heard together.

Mr. *B. Nunjundappa* for the second defendant, appellant.

Mr. *S. Narayana Rao* for the plaintiff, respondent.

The Judgments of the Chief Court were as follows:—

A. RAMACHENDRA IYER, J:—In O. S. No. 15 of 1887 on the file of the District Judge of Shimoga, the plaintiff Guru Siddappah sued on a deed of hypothecation and obtained a decree for money against the defendant Veerabhadrappa and against the property hypothecated. Subsequently to the date of the decree, the judgment-debtor sold to Linganna, the second defendant in this suit, a house and granary which had been mortgaged to plaintiff and which had been made liable for the judgment-debt. The plaintiff alleged that the defendants, with the intention of defrauding him, carried away the materials of the house and granary and thereby prevented him from executing his decree, or diminished the value of his

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security. He sued to recover Rs. 550 damages from both defendants.

The Munsiff of Yedahalli found that the defendants were in collusion and that the value of the property was Rs. 400. He made a decree for that amount against both defendants.

On appeal, the District Judge of Shimoga held that a fresh suit did not lie against the judgment-debtor, that the decree for damages passed against him was indefensible and that the second defendant having converted the house into movable property, the decree-holder ought to have attached the property under clause (*c*) section 268 of the Code of Civil Procedure. The decree made by the Judge was as follows:—

"It is ordered and decreed that no execution shall issue under the Munsiff's decree, which shall only be viewed as a declaratory one; that the plaintiff in O. S. No. 15 of 1887 on the file of the District Court shall be referred to District Court to take out execution in due course of law, under section 268 of the Civil Procedure Code, so far as the granary and its materials are concerned; and that each party shall bear his own costs throughout."

The 2nd defendant has made a second appeal. He contends that the District Judge had no power to give the directions he has given in the decree, and that he ought to have dismissed the suit when he found that a suit was not maintainable.

When the appeal came on for hearing for the first time, we were of opinion that the District Judge's decree could not be supported. He had no power to convert a suit for damages into a suit for declaration of title. Secondly, when the plaintiff was in a position to sue for consequential relief and when he in fact sued for damages, there were no grounds at all for making a decree for a bare declaration. Thirdly,

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the decree ought not to contain a direction that the decree-holder ought to proceed to attach the property in the hands of the second defendant under section 268 of the Code of Civil Procedure. The question for adjudication was, whether the plaintiff was entitled to recover damages. When the judge found against the right alleged by the plaintiff, he ought to have dismissed the suit. If the plaintiff had a right to attach the property, he had that right independently of the judge's direction; and, if he had no right to attach in execution of the decree, the direction given by the judge would be of no avail.

We could have reversed the decree and dismissed the suit for the reasons above stated, but we were reluctant to do so, without determining the question whether, upon the facts alleged by the plaintiff, he had a right to sue for damages, or whether the question was one which ought to be determined in execution of the decree he had obtained against the first defendant. The plaintiff having made no appeal from the District Judge's decree, there was no need to discuss the question of law involved in the suit. To prevent a failure of justice, we advised the plaintiff to file an appeal, so as to enable us to determine the question and to give him relief in case our finding was in his favor. He has made an appeal and the two appeals have been ably argued by Messrs. Narayana Rao and Nunjundappa.

The points for determination are these. When a mortgagee has obtained a decree against the mortgagor and the mortgaged property, if a third person voluntarily purchases the property from the mortgagor and if he destroys it or wastes it or otherwise diminishes the value of the security, is the pur-

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chaser a representative of the mortgagor for the purpose of executing the mortgagee's decree and is the question of damages or compensation a question which ought to be determined in execution or by a fresh suit?

Mr. Narayana Rao contends that the purchaser is not to be deemed a representative of the judgment-debtor, and he relies upon the judgments in *Ameeroonnissa Khatoon* v. *Abedoonnissa Khatoon* (1), *Gajadhar Prasad and another* v. *Ganesh Tewari and another* (2), and *Jagat Narain and another* v. *Jag Rup and another* (3). In the first of these cases, the plaintiff, who had a decree for possession, applied to be put into possession of land which was in the possession of a third person, who claimed under a title created by the judgment-debtors subsequent to the institution of the suit. An order for possession was made under section 323 of Act VIII of 1859. The third party, who was in possession, appealed from the order, and the High Court of Calcutta dismissed the suit, on the ground that the question was not one between the parties to the suit. Section 223 of Act VIII of 1859 directs how a decree for land or house shall be executed, if the house or land is in the possession of the judgment-debtor or of some one who holds on his behalf. If an attempt is made to disturb the possession of one, not a party to the decree, section 229 empowers him to represent his objections to the Court. Thereupon the claim is registered as a suit between the decree-holder as plaintiff and the claimant as defendant. Any decision made under this section is made appealable as a decree in an ordinary suit (section

(1) 16 W. R., 307. (2) 7 B. L. R., 149.
(3) I. L. R. 5 All., 452.

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231). Any party who did not choose to intervene under section 229 had of course his remedy by a regular suit. The legislature having made special provision for the investigation of claims made by third persons, it seems to me that in the Calcutta case before us, the party in possession ought to have made an application under section 229, and if the decision was adverse to him, he ought to have made an appeal under section 231. He was wrong in making an appeal under section 11 of Act XXIII of 1861 and I think that his appeal was rightly dismissed. I do not see the application of the rule to the case before us, as here we have a decree not for possession but for sale.

In *Gajadhar Prasad and another* v. *Ganesh Tewari and another* (1) I find that the plaintiff obtained a decree for possession and for rent, that the defendant's rights and interests in certain property were sold by auction and that one G. P. who was auction-purchaser preferred a second appeal against the decree passed in plaintiff's favor. The High Court held that it was doubtful whether what G. P. purchased at auction included the right to make a second appeal and, if he had the right at all, he ought to have made the judgment-debtor also a party to the appeal. This judgment is an authority for the proposition that the auction-purchaser alone had no right to make a second appeal. It did not decide that a purchaser could not under any circumstances be deemed a legal representative and therefore it has no bearing on the question we have to determine.

In *Jagat Narain & another* v. *Jag Rup and others* (2)

(1) 7 B. L. R., 149. (2) I. L. R. 5 All., 452.

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the plaintiff was first mortgagee and he had a decree to realize the debt by sale of the mortgaged property. Before he could execute the decree, the property had been sold in execution of a decree which a second mortgagee had obtained against the mortgagor. When the plaintiff found that the property was in the possession of auction-purchasers, he filed a fresh suit for cancellation of the sale and for making the property in their hands liable for his debt. The question arose, whether he ought not to have executed his decree. The Chief Justice held that a fresh suit was the only remedy. Three judges gave a more guarded answer. They held that a fresh suit was the most convenient remedy and that they could find nothing in the law to prohibit a suit of the kind. The fifth judge held that the auction-purchasers were not the judgment-debtor's representatives, that the decree-holder could not execute his decree as against them and that the suit brought by him was maintainable.

The Chief Justice and three other Judges having given no reason for their conclusion, I do not know how to test the validity of that conclusion, or to determine whether the rule may be followed by us or not. I am inclined to think that they held that a fresh suit was the only remedy or the most convenient remedy, inasmuch as there was a second mortgagee in the case who had executed the decree as against the mortgagor and who had not been made a party to the suit originally filed by the first mortgagee, and as it might be necessary to determine whether the second mortgagee had any equity as

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against the first and whether any directions ought to be given for sale or for redemption so as to protect the rights of both mortgagees.

The opinion of the fifth Judge is directly to the point. If, however, we bear in mind the distinction which has been made by the Privy Council between an auction-purchaser and a purchaser from a judgment-debtor at a private sale, a distinction which I shall refer to presently, the ruling that an auction-purchaser is not the legal representative of a judgment-debtor may not be considered as an authority for the contention that a purchaser at a private sale is not a representative of the debtor.

The case of *Behari Lal and others* v. *Ganpat Rai and another* (1) was a suit brought by the purchasers at a private sale from a mortgagor and judgment-debtor against mortgagees. The question arose whether a suit would lie. The judgment was as follows:—

"We think that the current of decisions show that section 244 does not apply to a case like this, and that current of decisions is opposed to the doctrine in the case cited to us."

This ruling may be considered an authority in support of the plaintiff's contention.

The judgment which was cited to the Allahabad High Court and which was not followed by that court is that of *Ramchandra Kolatkar* v. *Mahadaji Kolatkar* (2). One Mahadaji purchased the rights of a mortgagor during the pendency of a suit filed against the mortgagee. The purchaser did not apply to be made a co-plaintiff. After a decree was passed for redemption, he offered the money payable

(1) I. L. R. 10 All., 1. (2) I. L. R. 9 Bom., 141.

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to the mortgagee. The court refused to receive the money. Thereupon he filed a suit for redemption. West, J., in delivering the judgment of the court, said that the suit was unsustainable, that when he failed in the application made by him as representative of the mortgagor, he had an appeal open to him of which he did not avail himself, and that if he was not the representative, the right to redeem was foreclosed, the mortgagor having failed to redeem.

In *Anundo Moyee Dossee and others* v. *Dhonendro Chunder Mookerjee* (1) the question arose, whether a man who purchased at an auction-sale the rights of a mortgagor during the pendency of a suit for foreclosure was the representative of the mortgagor and whether he was bound by the decree for foreclosure. The Judicial Committee decided as follows:—

"Where there is a suit for foreclosure, and the mortgagor, a defendant to that suit, makes a voluntary alienation pending that suit, of any part of his interest in the equity of redemption, a purchaser will not be allowed afterwards to institute a new suit, the ground being that, if that were permitted, proceedings in a foreclosure suit would be endless, because every day a fresh alienation might be made in some parts of the proceedings. * * * Their lordships think that the title of a judgment-creditor or a purchaser under a judgment-decree cannot be put on the same footing as the title of a mortgagor or of a person claiming under a voluntary alienation from the mortgagor. They are of opinion, that the possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the mortgagee."

The Calcutta High Court has, in accordance with this judgment, decided that, when there is a decree against a mortgagor, a purchaser claiming under him

(1) 14 Moo. I. A., 101.

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under a voluntary alienation made subsequently to the decree is a representative of the judgment-debtor under section 244 of the Code of Civil Procedure. The latest ruling on the point is *Gour Sundar Lahiri v. Hemchunder Chowdry* (1). The judgment of that court on the question before us is to be found on p. 363, and is as follows:—

"The plaintiff purchased from the three mortgagors one of the properties previously mortgaged as mentioned in schedule II of the mortgage decree after that decree had been delivered. * * * He is therefore not only bound by the mortgage decree, but by reason of his having purchased privately from the mortgagors, must be regarded as in privity with them, and as their representative within the terms of section 244."

It seems to me that the preponderance of authorities is against the plaintiff's contention and that we must hold that the second defendant is in privity with the judgment-debtor, and that he is a representative of the debtor in regard to the house and granary purchased by him.

If the materials of the house were removed by the defendants, and if the security of the mortgagee was diminished, whether the question of damages or compensation is to be determined in execution, is the next point for consideration. I think the words "any other questions arising between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree" are wide enough to embrace the question of damages or compensation. "The effect of the section is to take away from the parties to the suit the right to raise by a fresh suit any question relating to their rights and liabilities under the decree, and in accordance

(1) I. L. R. 16 Cal., 355.

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with the whole policy of the law of procedure to make every such question determinable upon a proceeding before the same court and in the same suit. It substitutes a hearing in course of execution for a trial in a suit." *K. Sanjeeviyah* v. *Nanjiyah* (1).

Where there was a decree for land and when it was found in execution that there was a building on the land which had to be demolished, and that the decree was silent on the subject of demolishing, it was held in *Radha Gobind Shaha* v. *Brojender Coomar Roy Chowdry* (2), that the matter should have been determined in execution.

In the case of *Sungara Narayana Pillay and another* v. *Sandira Pillay and others* (3) there was a decree for land and growing crops. It was alleged that the defendants had carried away the crops before execution, and the decree-holder filed a suit for damages, that is for the value of the crop. The Madras High Court decided "that it was a question between the parties when execution was applied for by the plaintiffs, whether there were any crops upon the land which the defendants had removed after the decree and were compellable by process of execution to pay the value of in default of delivery".

Following the principle laid down by these decisions, I think that the question raised by the plaintiff is one which ought to be determined in execution of the mortgage decree and not by a fresh suit.

I would reverse the decrees made by the District Judge and by the Munsiff and dismiss the suit. As

(1) 4 M. H. C., 459. (2) 7 W. R., 372.

(3) 6 M. H. C., 14.

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this objection was not taken in the court of first instance and as the courts below have found against the defendants upon the merits, I think each party may be directed to bear his own costs throughout.

P. N. KRISHNA MURTI, J :—This case appears to me to be beset with great difficulties and the enquiry into it has been singularly defective and unsatisfactory. The parties apparently were not properly advised, and the judge of the original court slurred over the enquiry without giving a finding upon all the issues which he set down for decision. The District Judge did not take the trouble to find the necessary facts, but he thought he found an easy solution by awarding a declaratory decree in a suit where substantial damages were claimed. Without saying so, he practically dismissed the suit by making the decree of the first court inoperative. The 2nd defendant, against whom the decree did not operate at all prejudicially, brought up this appeal to this court, and the plaintiff did not file any objection till a suggestion was thrown out in that behalf by this court. The District Judge gave also some unintelligible directions as to how execution in O. S. No. 15 of 1887 on the file of the District Court should be sought after. On the whole, I have no hesitation in thinking that the decree of the District Judge cannot be maintained. In such an event, the 2nd defendant prays the plaintiff's suit might be ordered to be dismissed. Possibly the plaintiff might have urged all his grounds in defending himself against this prayer and the objection he has specially filed renders the point in contention very clear.

This suit was filed for the recovery of Rs. 550

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with costs. The plaintiff alleged that he obtained a decree against the 1st defendant in O. S. No. 15 of 1887 on the file of the District Judge of Nagar for Rs. 1,040, that the hypothecated immovable property was there held liable to the plaintiff's claim, that the 1st defendant with intent to defraud the plaintiff sold to the 2nd defendant a tiled house and a *panatha* or granary with its materials and that the 2nd defendant with the object of defrauding took away all the materials of the house and *panatha*. On these allegations he prayed for judgment for the value of the house and *panatha*, which he put down at Rs. 500 and for damages which he estimated at Rs. 50 with costs and further interest to be recovered from the 1st and 2nd defendants.

The 1st defendant pleaded that only the *panatha* was sold with the consent of the plaintiff for Rs. 50 and that the 2nd defendant removed the materials. He added that this sale was effected to meet the arrears of revenue due upon the land hypothecated to plaintiff. He denied his liability to pay damages.

The 2nd defendant stated that he was not aware of the decree obtained by the plaintiff, that he did not buy the house and *panatha*, that he did not remove any *panatha*, that he bought only some timber, beams, &c., for Rs. 50, and that he was not aware of these having belonged to the *panatha* hypothecated to the plaintiff. He denied his liability to pay damages.

Six issues were framed and of these 3 and 4 are important and they were as follows:—

"3. Who pulled down the materials of the granary in question, and when?

4. What did the 2nd defendant buy from the 1st defendant?

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Did he buy the built granary in question or the materials only? And for how much?"

The discussion of the evidence and this part of the judgment are very unsatisfactory and show that the Munsiff, who decided the case, did not understand the real bearing of the issues on the case and the importance due to such findings. The only words which may be taken as a finding on issues 3 and 4 are as follows :—

"And as the 1st defendant himself admits, the whole of it (granary) was sold to the 2nd defendant."

This finding falls far short of what is necessary to be found in the case. The finding does not state whether it was the superstructure alone which was sold or whether it included the land on which the granary stood. At all events, the plaintiff does not sue the 2nd defendant in this case with the object of reaching any property in his possession on which the decree of 1887 has imposed a liability in plaintiff's favor, but he simply seeks to obtain compensation for a wrongful act of this defendant in his having colluded with the other defendant and acted in such a manner as to diminish the value of the plaintiff's security. The Munsiff framed an issue as to whether the 2nd defendant was aware that either the granary in question or its materials bought by him had been made liable to the plaintiff's decree, but he failed to consider and decide it.

There is therefore nothing on the record to show collusion between the 1st and 2nd defendants, or that the latter had any knowledge of the fact of the decree of 1887 and that by his act he was interfering prejudicially with the right of the plaintiff, or that

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he was diminishing his security. In fact, there is nothing in the averments of the plaintiff or in the findings of the Munsiff to show that the 2nd defendant is now in possession of any tangible interest which he acquired from the 1st defendant which had been hypothecated to the plaintiff and against which the plaintiff now seeks specifically to proceed. All that can be gathered from the plaint is, that the plaintiff alleges that by the act of the 2nd defendant his security under the decree of 1887 was diminished and he seeks to recover the value of such diminution from him. He does not wish to proceed against any specific property in the 2nd defendant's possession. The question which, under these circumstances, presents itself for our determination is, whether the act complained of against the 2nd defendant furnishes an independent cause of action to the plaintiff, or whether, under any provision of the Code of Civil Procedure, he is bound to proceed against the 2nd defendant also on the execution side in the court executing the decree of 1887?

The question does not arise before us, as the 1st defendant is no party to this appeal, but if he was, I should not have hesitated to direct the plaintiff to the execution side under section 244 (*c*) of the Civil Procedure Code as far as he was concerned, as there it would have been clearly a question between the parties to the decree relating to the execution of such decree. But my difficulty in this appeal is to decide whether the 2nd defendant, as a representative of the 1st defendant, could be proceeded against on the execution side in the matter of the relief prayed for by the plaintiff. To make myself clear, I may once

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more repeat that the plaintiff does not seek in this case to reach any specific tangible interest which, as being in the possession of the 1st defendant at the time of the decree of 1887, was charged with the debt, but which has since passed to the 2nd defendant. If, as a matter of fact, the 2nd defendant had bought the house site also and had it in his possession and the relief prayed for by the plaintiff was to recover his debt out of such property, our task would have been easy to find that, *quâ* that property, the 2nd defendant was in privity with the 1st and that he was his representative for the purpose of the decree being executed against him. All the reported cases deal with persons having such property in their possession and litigating about such property. Where a portion of the property had disappeared, the party dealt with is the defendant himself, whose name appeared in the decree. In this case, no specific property is proceeded against and compensation is sought to be obtained from the 2nd defendant. It was probably this phase of the case which puzzled the District Judge and he avoided the difficulty by referring the plaintiff to the specific materials which belonged to the house and which were comprised under the decree of 1887. His direction however, is not, as I have already said, supported by any authority of law, and the difficulty of dealing with the 2nd defendant remains with full force.

I may here notice the difficulty and inconvenience of referring this matter to a new suit. Let us suppose that the plaintiff succeeds in proving his case and recovering some money as compensation for what he has lost in the way of the security which

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he had under the decree. The question arises as to how far this gain should affect his right under the decree which awards him a specific sum of money. Under any circumstances, he does not seem to acquire a right to obtain more money than what he is entitled to get under the decree, and it is repugnant to principles of natural justice, that he should be allowed to retain any greater advantage than that to which he is entitled. How can the required adjustment be made in the way of cutting such surplus off from the decree? It is far from clear that a court dealing *de novo* with the question of compensation and awarding a decree therefor can make any direction to bind the court executing the decree. Nor is it easy to see how a court simply executing the decree of 1887 can refuse to enforce the liability laid down by it fully, because the plaintiff had obtained some money on account of the same right in another suit. The acts of the two defendants are quite different though they affect the same indivisible right of the plaintiff. The damage which they cause to the defendant is so inseparably mixed up that it is only possible for the same court to assess it properly and make the required adjustment when executing the decree. It is impossible for two separate courts to deal with claims based upon one indivisible right so as to adjudge the same satisfactorily to all concerned. This difficulty suggests the desirability of giving power to one and the same court, which is the one executing the decree, to deal with such acts as are attributed to the 2nd defendant and to levy the proper compensation for the diminution caused thereby of

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the security granted by the decree for the enforcement of the debt.

Mr. Nunjundappa, the learned advocate for the 2nd defendant, regarded the effect of a decree charging immovable property with the payment of a debt as being the same as placing that property under attachment, and contended that, under this view, any alienation by the 1st defendant was, under section 276 of the Civil Procedure Code, void as against the plaintiff. Granting that such is the case, the utility of the contention is not very apparent. Section 333, which directs that the provisions of the preceding sections do not apply to a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree is made, can be construed to the same purpose, but in the absence of a claim to the specific property or to any portion thereof dealt with by the decree, this provision does not seem to help us out of our difficulty.

Bearing in mind the difficulty already mentioned of two separate courts dealing with the question, and the suggestion thereby offered of giving the jurisdiction to the executing court, we have next to consider the intention of our legislators when they enacted the Procedure Code. The policy of the law of procedure, as laid down there for the Indian courts, is to prevent multiplicity of suits and to give them power to have all necessary parties before them for enabling them to adjust their respective rights and liabilities once for all. This intention is exemplified by the provisions to be found in the Code for joining causes of action and parties, for bringing on record parties not before the court, for decreeing set-off, for

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recording satisfaction of cross decrees held by the same parties, and for settling all disputes which may arise with third parties in the execution of decrees. This cardinal policy of our legislature seems also to indicate that, when there is a real difficulty for any other than the executing court to adjust the conflicting claims of a plaintiff based, as they are in this case, upon distinct acts, but an indivisible right, the jurisdiction for deciding and adjusting such claims must be found in such court.

The only provision in the Code of Civil Procedure to meet such a case is to be found in clause (c) of section 244, which uses the word "representatives." If the foregoing provisions in any manner control the signification of this word, we must go back to section 234, which enables the representatives of a deceased judgment-debtor being brought on the record. Section 253, which comes after section 244, refers to the sureties. The only case when such representatives can be brought on the record being mentioned by this section, the natural interpretation to be put on that word in section 244 would be to limit it to such persons only. But a much more extended application has been made of this section. In *Rash Behari Mookhopadya* v. *Maharani Surnomoyee* (1), Pontifex and Field, JJ., thought that the word "representatives" in that clause might include subsequent representatives in point of interest and was not confined to heirs and executors. This construction, adopted by several of the British Indian High Courts, would seem to indicate that the enabling provision made in section 234 or 253 for suing out execution

(1) I. L. R. 7 Cal., 403.

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against any other than a judgment-debtor is by no means exhaustive but only illustrative. It seems to me that, in the application prescribed by section 235, the decree-holder can, under clause (*i*), mention the name of any person against whom he seeks to enforce execution, and it is for the court to decide whether he is properly a representative or not. As far as the facts in this case enable me to form an opinion, I decidedly think that the 2nd defendant should be regarded as a representative of the 1st defendant, so far as that portion of the interest is concerned which the 2nd defendant bought from the 1st defendant after the decree and which so far diminished the security of the plaintiff. The decree cannot be executed without dealing with such interest and the 2nd defendant's act with reference to it. So far as this interest is concerned, the 2nd defendant came by it with the full privity of the 1st defendant and may, without any inaccuracy of speech or thought, be regarded as his representative. As already observed, this extended construction is necessary to avoid the inconvenince, uncertainty and injustice which will result from the parties being referred to a separate suit, and to afford facilities for obtaining substantial and adequate justice. The parties are placed under no conceivable disadvantage as, to use the words of Scotland, C. J., and Innes, J., in the case of *K. Sanjeeviyah* v. *Nanjiyah* (1) "by this restriction no reasonable advantage is lost to the parties, for an appeal from the orders made in the prescribed proceedings is given."

For these reasons, I conclude that the plaintiff

(1) 4 M. H. C, 459.

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can bring the defendant on the record in the execution proceedings of the suit of 1887, and he ought not to be allowed to bring a fresh suit against the 2nd defendant who has, as it were, infringed a right of the plaintiff which cannot be enforced except in connection with the decree of 1887.

I agree to the plaintiff's suit being dismissed and to each party bearing his own costs throughout.

Defendant's appeal allowed and suit dismissed.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 *April 29.*

VEERAY GOWDA (PLAINTIFF) v. RUDRAYYA AND OTHERS (DEFENDANTS).*

Circumstances when lower appellate judgment is to be preferred to that of court of first instance—Civil Procedure Code, s. 373—Withdrawal with liberty to bring fresh suit—Grounds for—Objects of section.

On the facts the Chief Court agreed with the lower appellate court and dismissed the suit: that court having closely analysed and discussed the evidence and given cogent reasons for its conclusions.

Held, that the plaintiff having shown in his first plaint, in which no formal defect was observable, he knew what he was about and made no mistake at all, and the right to a moiety of the property which he sought therein being the only relief open to him, there were no grounds for permitting him to withdraw the suit with liberty to bring a fresh one. The object of s. 373 Civil Procedure Code is to give power to a court to help an innocent party who would suffer if he was not allowed an opportunity of rectifying a formal defect owing to which he would unjustly lose a suit or of correcting any other honest mistake of fact which he might have innocently made from insufficient information.

Mr. *Ramaswamy Chetty* for the appellant.

Mr. *Ramaswamier* for the respondent.

*Appeal No. 123 of 1891 against appellate decree No. 187 of 1891 of Mr. C. Srinivasiengar, District Judge of Mysore, reversing decree No. 1098 of 1890 of Mr. B. Vencatachar, Munsiff of Nanjangud.

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The following are the judgments of the Chief Court:—

A. RAMACHENDRA IYER, J:—The 1st defendant obtained a decree against one Gopa and in execution attached the field (Survey No. 6). The plaintiff alleged that he had purchased it from the second defendant who had purchased it from the third defendant (Gopa's brother). He prayed for a declaration of his right to the field and for its release from attachment. He also prayed that a moiety of the field might be released if it was found that the judgment-debtor had a right to the remaining moiety.

The Munsiff of Nanjangud decreed the claim to a moiety; and on appeal the District Judge reversed the decree and dismissed the suit. The plaintiff has brought this second appeal and prays that the Munsiff's decree may be restored.

The District Judge has set out all the facts in his judgment and has very closely analysed and discussed the evidence, and has given cogent reasons for the conclusion at which he has arrived. I am of opinion that his finding is right and I generally agree in the reasons he has stated in the judgment.

I do not think that the evidence is sufficient and satisfactory to prove the sale alleged to have been made to the second defendant by the third. The second defendant did not execute a conveyance to plaintiff. When the third defendant tendered a razeenamah for transfer of the puttah to plaintiff's name he stated that he had sold the land to him and not to second defendant. These facts taken in conjunction with the fact that the razeenama was tendered after the property had been attached by the first defendant raise a suspicion in my mind that the two

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sales alleged in the plaint were only nominal. I would dismiss the second appeal with costs.

I have only to animadvert on the conduct of the Munsiff in permitting the first plaint filed by the plaintiff to be withdrawn. The plaintiff then alleged that he had purchased Muncha's right, and his complaint against the first defendant was that he had attached the field as if the whole belonged to the judgment-debtor Gopa. He prayed for confirmation of his right to one half of the property on the ground that his vendor was entitled to it. The judgment-creditor asserted the right of the debtor to the entire field and denied that the plaintiff's vendor had any right to it. Issues were framed whether the whole of the field belonged to the debtor, and whether plaintiff's vendor was entitled to the southern moiety. When the suit came on for final hearing, the Munsiff made a note as follows:—

"The plaintiff's pleader puts in an application under section 373 as the prayer portion was wrongly worded. The plaintiff is permitted to withdraw with permission to bring a fresh suit."

Upon the allegations made in the plaint, the relief for confirmation of plaintiff's right to a moiety of the property was the only relief which the plaintiff could have sought. He well knew what he was about and he made no mistake at all. There were no sufficient grounds for permitting him to withdraw the suit. The Munsiff does not seem to have bestowed any consideration upon the propriety of the application made by plaintiff's pleader.

P. N. KRISTNA MURTI, J:—In the plaint which was allowed to be withdrawn the plaintiff makes a distinct allegation of the fact that Gopa was not entitled to mortgage the whole of the land in dispute. His

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right to one half was virtually conceded. In this suit the plaintiff's 4th witness has stated that Muncha was in the enjoyment of other land a portion of which he sold to one Chicka. The learned District Judge has shown the possiblity of the two brothers having enjoyed two whole fields separately and their contiguous position having led the witnesses to suppose that they were portions of the same field. Judging of the evidence by the light of these two cardinal facts I am of opinion that the District Judge's conclusion is correct. I quite agree with him in thinking that the plaintiff having prayed the court to declare his title it is incumbent upon him to prove it. He has failed to do so and the evidence he has adduced has been rightly disbelieved. It is inconclusive, vague and inconsistent. I agree therefore to this appeal being dismissed.

I am also of opinion that the provisions of section 373 were misapplied when O. S. No. 312 of 1890 was allowed to be withdrawn. The object of the section is to give power to a court to help an innocent party who would suffer if he was not allowed an opportunity of rectifying a formal defect owing to which he would unjustly lose the suit or correcting any other honest mistake of fact which he might have innocently made from insufficient information. There was no formal defect observable in the plaint of 1890, and it was the plaintiff who acquired his title by purchase shortly before the suit. It must be expected that a man purchasing immovable property would make all the necessary enquiries and obtain accurate information of facts. There is no excuse at all for the plaintiff to plead any ignorance in this

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respect and in the statement of facts the present plaint does not materially vary from the other. Under these circumstances the Munsiff seems to have acted on very insufficient grounds when he permitted the withdrawal of the suit of 1890. He ought not to have allowed the plaintiff to be benefited by the defence disclosed in that case and to change his subsequent suit accordingly.

Appeal dismissed.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1892 *May 4.*

LUKSHMAY GOWDA (PLAINTIFF) v. NARAYANI (DEFENDANT).*

Concurrent finding of lower courts—Binding on second appellate court —Construction of Survey Rules—Poot Kharab land.

Held that, whether the lower appellate court rightly or wrongly construed the Survey Rules, the distinct and concurrent finding of both the lower courts on a question of fact is binding on the court of second appeal.

At the same time, the court do not assent to the proposition that because appellant is holder of a portion of Survey No. 5, he is therefore by operation of the Rules entitled to trees standing on the bank of a pond the ground occupied by which and a temple has been deducted from arable area and classed as *Kharab*.

The plaintiff sued to recover Rupees 5 as damages and to restrain the defendant from interfering with two trees which he claimed as his, as having been planted by his ancestors.

The court of first instance held that the plaintiff had failed to prove the trees to be his: they stood on the bund of a pond and seemed to be annexed to a temple near by.

In appeal, the Subordinate Judge held also that

* Appeal No. 131 of 1891 against appellate decree No. 56 of 1891 of Mr. M. Ramaswami Iyer, Subordinate Judge of Mysore, confirming decree No. 43 of 1891 of Mr. C. B. Seshagiri Rao, Munsiff of Seringapatam.

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the plaintiff had not shown that the trees were planted by his ancestors or that they or himself had exercised any rights of ownership over them : the mere fact of their lying within the precincts of his land could not confer any right on him. The evidence showed that 10 guntas of land were deducted from the lot known as Survey No. 5, a portion of which number was plaintiff's land and classed as *Poot Kharab*, and that it was on this latter the trees and pond were situated. On this the plaintiff contended that, inasmuch as all *Poot Kharab* land belongs to the occupant of the number and the settlement gives him full liberty either to bring them under cultivation or not without additional assessment, he has a right to this *Poot Kharab* and to the trees on it. This argument and the claim based on it was, on review of the Survey Rules, rejected by the Subordinate Judge, who concurring with the first court dismissed the suit.

The plaintiff preferred a second appeal to the Chief Court.

Mr. *S. Narasimha Iyengar* for the appellant.

Mr. *C. Rungiengar* for the respondent.

The judgment of the Chief Court (THUMBOO CHETTY, C. J., and KRISHNA MURTI, J.), was as follows :—

Both the courts below found concurrently that the trees in dispute did not belong to plaintiff and that there was no evidence to support the plaintiff's allegation, that the trees were planted by his ancestors. Whether the lower appellate court rightly or wrongly construed the Survey Rules quoted in its judgment, there is a distinct and concurrent finding on a question of fact that the plaintiff had no right to the trees and that they were never in the exclu-

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sive possession and enjoyment of himself or his ancestors. This finding is binding on the court. We wish, however, to remark that we are not prepared to assent to the proposition that because the appellant is a holder of a portion of Survey No. 5 he is entitled, by the operation of the Survey Rules, to the two trees standing on the banks of a pond, the ground occupied by which and a temple has been deducted from arable area and shown as *kharab* in Exh. No. 5. Gidapatrike Exh. B does not show that these trees are in the appellant's portion of Survey No. 5. We therefore dismiss this second appeal.

Appeal dismissed.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 *May* 18.

HANUMANTHA ROW (DEFENDANT No. 2) *v.* M. RAMACHENDRA ROW (PLAINTIFF).*

Bailment—Contract Act, ss. 148, 182 and 212—Agency—Wrongful detention or conversion—Damages—Measure of.

A deposited three jewels with *B*, a bank director, with instructions to sell them and apply the proceeds towards discharge of a debt due by him to the bank. *B* failed to fulfil his promise and *A* had to borrow elsewhere to repay the bank. *B* evinced no intention whatever of fulfilling his promise but from the moment he got possession of the jewels converted them to his own use; further, he knew all the facts and that unnecessary delay on his part would cause needless loss to *A*. It was in his power to have relieved *A* from such loss, of which he was aware, and he misconducted himself by not only not carrying out *A's* directions but by denying *A's* claim. *A* sued for value of jewels, interest on money borrowed and damages.

Held, that the above facts constituted more than a simple bailment under the Contract Act s. 148, whereby the bailor could only

* Appeal No. 138 of 1891 against appellate decree No. 1 of 1891 of Mr. T. Narahari Rao, District Judge of Nundidroog, modifying decree No. 269 of 1890, of Mr. C. Srinivasiengar, Subordinate Judge of Mysore.

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claim the value of the thing bailed; but they showed that *B* was liable either as a wrong-doer or as a negligent agent under the Contract Act ss. 182 and 212; and in either ease would be liable to *A* for special and consequential damage over and above the value of the jewels. Interest from the date of deposit might have been awarded to *A*.

On appeal to the Chief Court by defendant No. 2,

Mr. *S. Ramaswamy Iyer* appeared for the appellant.

Mr. *D. Venkatramiah* for the respondent.

The following judgments of the Chief Court were delivered :—

RAMACHENDRA IYER, J.—This was a suit for the recovery of three jewels or for their value and for damages. The plaintiff alleged that he deposited three jewels with the defendants with instructions to sell them, to apply the proceeds towards the discharge of a debt due by him to a bank, and to pay him the remainder of the money. As the defendants failed to fulfil their promise, the plaintiff was obliged to borrow elsewhere to repay the money due to the bank. He prayed for a decree for the amount which he had been compelled to pay to the bank, as interest which he need not have paid but for the default made by the defendants, and he prayed also for damages for the wrongful detention of his jewels.

The second defendant, who is the appellant before us, denied all the allegations made in the plaint.

It has been concurrently found by the courts below that the deposit alleged by the plaintiff was true. A decree has been made directing the defendants to pay Rs. 670 the value of the jewels, Rs. 188–10–0, being the interest paid by the plaintiff to the bank, and Rs. 120 being the damages sustained by the plaintiff by reason of the defendant's wrongful conduct.

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The second defendant contends that the decree for interest and damages is bad in law. His argument is that there was a contract of bailment, and that if the bailee did not return the jewels on demand, the most that the bailor could claim was the value of the property itself. When the appeal was argued, I was inclined to agree in the contention of the appellant; but having taken time to consider the question, I have arrived at the conclusion that the decree made by the District Judge ought to be upheld.

When I consider the conduct of the defendant as proved by the facts found by the courts below, I think the suit is in substance a suit for the wrongful conversion of the plaintiff's jewels. The denial of the contract of bailment, the repudiation of the plaintiff's right to the jewels which are now in defendant's possession and his exercise of dominion over them inconsistent with the plaintiff's right are acts which render the defendant liable as a wrong-doer.

When a defendant is guilty of conversion, it is not the law that he ought not to be made to pay more than the value of the property converted to his use. He may be ordered to pay interest over and above the value of the goods at the time of conversion, and special or consequential damage may also be recovered from him (*see* Mayne on Damages, 4th ed. p. 377). From the conduct of the defendant, it is obvious that he had no intention at all of fulfilling the promise he made to the plaintiff and that from the moment he got possession of plaintiff's jewels he converted them to his own use. In this view of the case I think that the courts below might have

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awarded interest to plaintiff from the date of deposit. As interest from the date of deposit would exceed the amount which has been decreed to the plaintiff, I see no reason to disturb the decree.

We may look at the case from another point of view. The defendant agreed to act as the plaintiff's agent for the purpose of selling his jewels and discharging the debt due to the bank. The defendant knew full well that the plaintiff was most anxious to convert his jewels into money, and that he desired to repay the debt as early as possible and to make use of the remainder of the money for other purposes, and that it was this consideration alone which induced him to leave the jewels with the defendant. He also knew that unnecessary delay on his part would cause needless loss to the plaintiff. If he made a *bonâ fide* endeavour to perform his duty as agent and if he was unable to sell the jewels at all or to sell them at a fair price, he as an honest man was bound to have returned the jewels to the owner at the earliest date possible. He either wilfully abstained from performing his promise or he was culpably negligent. The necessity which the plaintiff was under to provide money from other sources for repaying the debt due to the bank and the loss of interest which he sustained by not having the use of his money, were matters which were in the contemplation of the parties when the agency was created. The loss sustained by the plaintiff could have been easily foreseen by the defendant and it could have been wholly averted or considerably mitigated by ordinary diligence and honesty on his part. In regard to the liability of an agent for misconduct or for negligence,

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the rule laid down by Justice Story and repeated with approval by Mr. Mayne at p. 509 of his treatise on Damages is as follows :—

"Whenever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority, or by positive misconduct or by mere negligence, or omission in the proper functions of his agency, or in any other manner, and any loss or damage falls on his principal, he is responsible for it and bound to make a full indemnity. In such cases it is wholly immaterial whether the loss or damage be direct to the property of the principal or whether it arise from the compensation which he has been obliged to make to third parties in discharge of his liability to them, for the acts or omissions of his agent. The loss or damage need not be directly or immediately caused by the act which is done, or which is omitted to be done. It will be sufficient if it be fairly attributable to it as a natural result or a just consequence."

The reasons for the rule being founded upon natural justice and not upon considerations special or peculiar to any particular country, I think we may adopt them and apply them to the case before us. I think the damages which the defendant has been decreed to pay may be fairly awarded against him whether he is regarded as an agent, or as a wrong doer. I would uphold the District Judge's decree and dismiss the second appeal with costs.

KRISHNA MURTI, J.—I am glad my learned colleague has accepted the views suggested by me and has thus enabled me to concur with him in this judgment. In whatever light we view the conduct of the appellant there can be no doubt that it is characterised by mortal turpitude. I sympathised with the respondent when his advocate dwelt at length on the hardship and loss which he suffered on account of the misconduct of the appellant, but he did not meet the objections of the Assistant Government Advocate on any recognized legal basis.

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It does not appear to me to be quite correct to call the deposit of the jewels in this case a bailment. Section 148 of the Contract Act defines a bailment as "the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them".

This definition presupposes the accomplishment of a preliminary purpose before the goods bailed are returned or otherwise disposed of. In regard to the jewels in question there was no such purpose intended or accomplished. All that the owner wanted the defendants to do was to sell them and appropriate the sale proceeds in a particular manner. The contractual relation thus established between the parties is that of a principal and agent under section 182 of the Contract Act. The agent's duties are laid down in section 212, according to which an agent is always bound to make compensation to his principal in respect of the direct consequences of his own misconduct.

The question which thus presents itself for our determination, if the liability of the defendant is viewed as arising *ex contractu*, is whether the interest which the plaintiff paid to the bank is a direct consequence of the defendant's misconduct, and whether such misconduct does not entitle the plaintiff to claim interest on account of the wrongful detention of the balance of money due to him. The defendant who is the appellant before us was one of the directors of the bank. He it was that passed the loan to the plaintiff. He received the deposit of the jewels and was

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made to know that the plaintiff's means of returning the debt consisted of the money to be realised from the sale of the jewels. The plaintiff constantly demanded from the defendant the fulfilment of his promise and he was put off. The plaintiff held on till he was sued, when he had no alternative but to pay. He paid and his prayer to be reimbursed for his losses seems to be very natural. The defendant both as a director of the Bank and from the demands made by the plaintiff from time to time knew what was going on. It was in his power to have relieved the plaintiff from these losses of which he was aware and he misconducted himself by not only not carrying out the directions of the plaintiff but also by denying the plaintiff's claim. The loss of interest due on the balance of money is also directly due to the misconduct of the defendant and I have no doubt the plaintiff is entitled to recover it.

I also think that, although the defendant came into possession of these goods originally by lawful means yet his subsequent detention was wrongful. The wrong is what is termed a detention or a conversion, and I am of opinion that in such a case special and consequential damages may be awarded.

I agree to this appeal being dismissed with costs.

Appeal dismissed.

Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1892 *June* 27.

ANNAY GOWDA, SINCE DECEASED, BY HIS SON AND LEGAL REPRESENTATIVE, MALLAY GOWDA (PLAINTIFF) *v.* MALLAY GOWDA (DEFENDANT NO. 1).*

Recovery of money paid under pressure—Compulsion—Undue influence—Free agency—Voluntary payment.

A paid money levied from him by *B* under the name of a fine for

*Appeal No. 7 of 1892 against appellate decree No. 306 of 1890 of Mr. C. Srinivasiengar, District Judge of Mysore, reversing decree No. 202 of 1890 of Mr. T. J. Vanderlowen, Munsiff of Hassan.

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violation of caste rules. It was proved that *B*, though a head-man, had no authority from the Caste to levy such a fine and that he acted singly and arbitrarily. He also used pressure to prevent the celebration of *A*'s son's marriage until the fine was paid. *A* knew that *B*'s conduct was unjust, but nevertheless paid the money in order that the marriage ceremony might not be disturbed and to secure peace of mind and the honor of his family.

Held, that, under these circumstances the payment was not voluntarily made and *A* could recover the amount from *B* as money obtained by the latter by undue influence.

The doctrines of English Equity as laid down in Story's Equity Jurisprudence, sec. 239 and *Hall* v. *Hall* (1) approved.

The District Judge of Mysore having reversed the decree of the Munsiff of Hassan, which gave the plaintiff a decree for Rs. 25 claimed from the defendant as illegally obtained from the plaintiff by undue influence, the plaintiff preferred a second appeal to the Chief Court.

Mr. *J. Evers* for the appellant.

Mr. *S. Narayana Rao* for the respondent.

The facts of the case are given in full in the judgment in the Chief Court (THUMBOO CHETTY, C.J. and RAMACHENDRA IYER, J.), which was as follows:—

The plaintiff alleged that, when he was about to perform his son's marriage, the defendant threatened to stop the ceremony, on the ground that he (plaintiff) had taken food in the company of one Kenchay Gowda who had been excommunicated. The plaintiff was coerced into paying Rs. 25 to the defendant to prevent any disturbance of the marriage ceremony. The allegation that Kenchay Gowda had been excommunicated was false, and the defendant had no power to levy the fine. The plaintiff sued for the money and for damages.

(1) L. R. 1 P. and D., 482.

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The defendant pleaded that he did not impose a fine, that the fine was imposed by a panchayet of the caste people and Iyas of the village Mutt, that Kenchay Gowda had been excommunicated, that the plaintiff admitted having violated caste rules by dining with the said Kenchay, and that the payment was voluntarily made by him to the caste people.

The Munsiff of Hassan disbelieved the defendant's case and directed him to repay Rs. 25 to the plaintiff. The District Judge of Mysore dissented from the Munsiff's finding and dismissed the suit. The plaintiff has made a second appeal.

Defendant's first witness deposed that he was the Guru of the parties, that he had excommunicated Kenchay upon information furnished by the defendant, that he did not authorize the defendant to levy a fine from the plaintiff, that the defendant and Muttideah had power to act jointly in caste matters, and that the defendant alone had no power to make an order or to levy fines.

The second witness deposed that there was a rumour that Kenchay had been excommunicated, that he was not personally aware of the fact, that he did not know that a caste panchayet had been held to enquire into his alleged misconduct, that he and his fellow villagers and their Guru ate with plaintiff and with Kenchay Gowda, they all thought that Kenchay was then in caste, and that neither he nor any of his fellow-villagers was excommunicated on this account or required to pay a fine.

The evidence of the third witness was to the same effect.

The fourth witness professed to have joined with

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the defendant and others in levying fine from the plaintiff; but he stated in cross-examination that he did not know who complained against Kenchay, who were examined then, or who were present when the enquiry was made. He was equally ignorant of what happened when the plaintiff's offence was brought to his knowledge. He admitted that Kenchay was now in caste, that he did not know how he was re-admitted and that he and the defendant had not ordered the re-admission.

The fifth witness deposed that a panchayet was held to enquire into the plaintiff's misconduct, that the plaintiff then admitted his guilt and promised to pay a fine of Rs. 25. He professed to have been present when Kenchay was excommunicated; but he also, like the former witness, stated that he did not know who brought the charge against Kenchay or who substantiated the charge. He contradicted the former witness and said that Kenchay was not present when the enquiry was held. He said that the former witness was present when the plaintiff appeared before the panchayet and admitted his guilt, whereas the fourth witness deposed that he was not present when the enquiry was held. He also admitted that Kenchay was now in caste.

The evidence of the sixth witness was to the effect that, when a meeting of the caste people was held to enquire into the charge of Kenchay having had intercourse with a pariah woman, the plaintiff, Kenchay and the said pariah woman were present; and that no order was passed requiring Kenchay to pay a penalty. By making these allegations, the witness has contradicted both the former witnesses.

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The seventh and last witness said that he was not present at any of the panchayets, that the caste men were bound to decide if a caste man violated the rules of their caste, and that the Shetty-yejaman and the Muktasar-patel took a prominent part at such meetings, but nothing could be done without the Guru.

The evidence which we have set out does not establish that a meeting had been regularly held to enquire into the misconduct of Kenchay Gowda, and that he had been excommunicated. If the plaintiff was wrong in having associated with Kenchay Gowda, no enquiry was held into his conduct by a meeting of his caste men, the Yejaman, Patel and the Guru, and no formal order was passed either to expel him from the caste or to levy a fine from him. The defendant appears to have acted singly and arbitrarily in the matter when he insisted upon the payment of Rs. 25. He wrote to Mallay Gowda to prevent the marriage and to prevent the barber, washermen and others from rendering any service. The plaintiff knew that the defendant's conduct was unjust, but he nevertheless paid the money in order that the marriage ceremony might not be disturbed.

Upon these facts the question of law arises, whether the payment was voluntary, or whether the consent of the plaintiff was obtained by undue influence. It is impossible to believe that the plaintiff paid the money as a free agent. The circumstances under which the demand was made shew that he feared that evil consequences would follow if he refused to comply with the demand, and that he paid the money to secure peace of mind and the honor of the family.

The doctrine of the English courts in cases of this

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kind is stated in sec. 239 of Story's Equity Jurisprudence :—

"Cases of an analogous nature may easily be put where the party is subjected to undue influence, although in other respects of competent understanding. As when he does an act or makes a contract when he is under duress or the influence of extreme terror or of threats, or of apprehensions short of duress. For, in cases of this sort he has no free will. And the constant rule in equity is that where a party is not a free agent and is not equal to protecting himself, the court will protect him. * * Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may in like manner so entirely overcome his free agency as to justify the court in setting aside a contract made by him on account of some operation or fraudulent advantage or imposition attendant upon it."

The rule of law laid down in *Hall* v. *Hall* (1) is pertinent to the case before us :—

"Pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is used or threatened."

These are sufficient authorities for holding that the defendant obtained money by undue influence, and that the payment was not voluntarily made. The defendant has no right to retain the money and the plaintiff is not prevented from claiming it back.

The decree of the District Judge is reversed and the Munsiff's decree is restored with costs throughout.

Appeal allowed with costs.

(1) L. R. 1 P. and D., 482.

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REGULAR APPEALS.

Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1892 March 18.

APPAY GOWDA (PLAINTIFF) v. THIMMAPPA (DEFENDANT).*

Sale—Liability of vendor to vendee—Absence of covenant in deed—Failure of consideration—Misrepresentation—Fraud—Plaint—Clearness—Code of Civil Procedure (Act XIV of 1882) ss. 117, 118.

A vendor professed to sell no more than the right, title and interest he possessed. This only was stated in the sale-deed which contained no covenant for title or further assurance. The vendor therefore cannot be made liable to his vendee for fraud, misrepresentation or failure of consideration in the event of such right, title and interest subsequently turning out less than the vendee anticipated, it having moreover been open to the vendee to make all necessary enquiries before purchase.

Per RAMACHENDRA IYER, J.—The vendee having filed a plaint which did not clearly disclose what his cause of action was, the Munsiff should have insisted on its amendment. Ambiguous pleadings are to be remedied by careful scrutiny and exercise of the powers given to courts under ss. 117 and 118 of the Code of Civil Procedure.

In this case the plaintiff sued the defendant upon a plaint in the following terms:—

1. On the 20th November 1880 the defendant sold to the plaintiff the property described in the plaint schedule, under a duly registered deed of sale, for Rs. 200, stating that he acquired it from his self-acquired funds and as such it formed his self-acquisition; that no other but himself has a right thereto and that he is the sole owner thereof.

2. Since then till about November 1888 the plaintiff has undisturbed possession of it. In 1888 the defendant collusively with intend to defraud plaintiff set up his brothers Pootappa and Seenappa: the said Pootappa and Seenappa filed a suit in O. S. No. 884 of 1888 on the file of this court and stated that they were connected with the scheduled property (schedule filed with plaint) and that their shares

* Appeal No. 251 of 1891 against original decree No. 694 of 1890 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 24th June 1891.

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should be given to them. The defendant contrary to the belief created (in plaintiff's mind) as stated in para. 1 of the plaint, admitted the rights of his brothers Pootappa and Seenappa in the said suit to the property described in the plaint schedule. He deposed further that their (the brothers') shares might be recovered from the plaintiff and given. Thereupon it was decreed that Pootappa and Seenappa are together entitled to ⅔rds of the said property. They were in execution put in possession of it about 15 or 20 days ago.

3. The defendant was aware of the falsity of the allegations stated in para. 1 of the plaint. He with intent to practise fraud on plaintiff executed the document herewith filed containing false allegations, &c. Plaintiff thereby sustained a loss of Rs. 133-5-4 (⅔rds of Rs. 200 paid by him for the land), of Rs. 100 (⅔rds of Rs. 150 spent for its improvement after purchase), of about Rs. 47-13-0 court costs paid to Poottappa and Seenappa in the said suit and of about Rs. 30 costs incurred by plaintiff; in all Rs. 311-2-4. Although the defendant was not the sole owner of the said property yet he falsely made plaintiff to believe that he was the sole owner and to act upon such belief, to purchase the said property. The defendant thereby practised fraud on the plaintiff and the former is therefore responsible for losses sustained by the latter.

4. Cause of action accrued in or about July 1890 at Poottanyanahalli.

5. Prays judgment—

For the recovery of Rs. 311-2-4 losses sustained by the plaintiff consequent upon the fraud practised by the defendant as stated in the plaint, for court costs and for such other relief as the court may deem proper to grant under the circumstances of the case.

The defendant filed the following written statement in reply :—

1. Defendant did not inform plaintiff that the property sold was his self-acquired property and that there were no other sharers therein.

2. Plaintiff was not only aware of the existence of other sharers in the said property but he knew also that it was defendant's ancestral property.

3. Plaintiff said to the defendant that he would obtain the consent of the other sharers or that he would buy their rights

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in the said property. He obtained a sale-deed from the defendant of the property, valued at upwards of Rs. 1,000. Plaintiff paid defendant Rs. 200, being less than the amount which he was legally entitled to.

4. Defendant made no guarantee of the said property sold with reference to the other co-sharers. Plaintiff has subjected himself to the law of "caveat emptor". He effected no improvements to the disputed property.

5. All the allegations made in the plaint contrary to what is set forth in this written statement are false. Plaintiff is not entitled to any of the relief prayed for in the plaint.

6. The damages claimed are excessive. The plaintiff is not according to law entitled to damages: for the reasons stated above defendant prays for the dismissal of the plaintiff's suit with costs.

On these pleadings issues were framed by the court; and at the trial the plaintiff called three witnesses and filed the sale-deed given to him by the defendant as well as one made in favor of the latter by the previous owners of the property. The defendant called no witnesses and filed no documents.

The Munsiff, finding in the sale-deed that (1) the property conveyed was only the right, title and interest of the defendant in what was therein described as his ancestral property and (2) that the deed contained no covenant for title or further assurance, dismissed the plaintiff's claim with costs.

The plaintiff appealed to the Chief Court.

Mr. *L. Srinivasiengar* for the appellant.

Mr. *Narayana Rao* for the respondent.

The judgment of the Chief Court (THUMBOO CHETTY, C. J., and RAMACHENDRA IYER, J.) was as follows:—

We are of opinion that the plaintiff has entirely failed to prove that the defendant has been guilty of fraud or concealment of facts in connection with the sale of the *chuttrum* in dispute. He professed to sell

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and convey (and this is what is actually stated in the sale-deed) nothing more than the right, title and interest he possessed in the *chuttrum*. The plaintiff was aware at the time of sale that the defendant had two brothers. There was nothing to prevent his questioning the brothers and ascertaining from them what right, if any, they had to the *chuttrum*. All the title deeds were given over to and shown to the plaintiff, which showed when and how the *chuttrum* was acquired, and the plaintiff could have easily made all the necessary enquiries and satisfied himself as to whether the defendant was the sole owner of the *chuttrum* or not, before he purchased the property. The recital in the deed that the defendant conveyed only his right, title and interest, was sufficient to put the plaintiff on his guard and to induce him to make the needful enquiries from the defendant's brothers. This he failed to do, and when the brothers sued the plaintiff for their two-thirds share, he pleaded that the defendant sold the *chuttrum* as the manager of the family and for family necessities, a plea which was quite inconsistent with all that he now alleges in his plaint.

The present action is, in our opinion, not maintainable. We therefore dismiss this appeal with costs.

Ramachendra Iyer, J.—I wish to remark that, before the Munsiff admitted the plaint, he ought to have insisted upon an amendment so that the ground of action might be explicitly stated. It was not clear from the plaint whether the plaintiff's cause of action was a breach of warranty of title, or fraudulent representation upon the faith of which he was induced to buy the *chuttrum*, or partial failure of consideration. Indeed the appellant's advocate was

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not able or willing to state distinctly the ground on which he claimed relief. If it was breach of warranty of title, the exact nature of the contract ought to have been set out in the plaint. If the suit was founded upon a fraudulent representation alleged to have been made by the defendant, the plaintiff ought to have set out all the facts so as to enable the defendant to admit or deny those facts, and so as also to enable the court to judge whether fraud could be presumed from those facts. If the suit was simply for refund of a portion of the purchase money on the ground of partial failure of consideration, the fact could not be denied. There was no necessity for recording oral evidence and the judge had only to determine the question of law. Ambiguous plaints and written statements confuse and protract proceedings in lower courts, and there is no other effectual remedy than to scrutinise plaints and written statements, and to exercise the power given to courts to examine parties before issues are settled.

Appeal dismissed with costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 *May* 16.

CHICKA GUNGIAH (DEFENDANT No. 1) *v.* GURUPATHAPPA (PLAINTIFF).*

Easement—Light—Damages—Joint right in property—Adverse possession.

The plaintiff as joint owner with the defendants of a dwelling house comprising their two tenements, sued to compel the defendants to allow him access to certain parts of the premises enjoyed by the owners of the house in common and his right of way to which the defendants obstructed; also for damages. He further

*Appeal No. 280 of 1891 against original decree No. 378 of 1890 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 3rd day of June 1891.

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sought to compel removal of a wall which, though built on the defendants' property, he alleged diminished the access of light to his tenement so as to prevent his continuing his business of a weaver.

Held, that the right claimed by the plaintiff is not an easement: he does not claim right as owner of a dominant tenement, but as having a joint interest with the defendants. A right in or to land is quite different from a burden imposed upon that land for the benefit of other land.

Held further, that the ownership being clear, the question is whether there is evidence of long continued hostile possession so as to extinguish the plaintiff's right. Defendant No. 2 was in possession as mortgagee, but, whether he exercised all the powers which his mortgagors possessed or enjoyed the property in any other manner he considered most convenient, it cannot be said that defendant No. 1 acquired a right by adverse possession as against the mortgagors.

Held further, that the defendants having by their wrongful act prevented the plaintiff from exercising his right, they are rightly liable in damages.

Held further, that the plaintiff having grounded his action in respect of the wall in the *angala*, not upon the fact that the latter was common to both parties and therefore one alone could not erect a wall without the consent of the other, but that the erection of the wall diminished the supply of light to his portion of the house, the reasons given by the Munsiff are sound for disallowing the claim upon the ruling in *K. Koosama and others* v. *T. Srinivasiengar* (1) which held that the deprivation must be substantial in order to confer a right of suit.

In this case the plaintiff purchased a tenement which, with that of the defendants, formed one big house. The previous owners had mortgaged their property to defendant No. 2; and the plaintiff, on his purchase, had paid off the mortgage and obtained possession. Subsequently the defendants (who were brothers) had raised obstructions in the court-yard which prevented the plaintiff from having access to portions of the premises used in common, and had built a wall which cut off the light from his dwelling.

(1) 6 M. L. R., 104.

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He therefore sued for removal of the obstructions and the wall, for a perpetual injunction and for damages. He alleged that his work as a weaver was interfered with and his receipts lessened by the diminution of light caused by the wall.

The Munsiff gave a decree for removal of the obstruction and for Rs. 5 damages; but as to the easement of light remarked as follows:—

The plaintiff contends that the house has been rendered dark by reason of a few slab stones having been arranged in the shape of a wall and that in consequence he had to give up his profession as weaver, thereby sustaining great loss. The stones are placed on the defendant's portion of the *thotty*. He is therefore perfectly justified in enclosing his share by means of a wall and it is not clear how far the plaintiff's house is darkened and is unfit to be a dwelling. The plaintiff's case is that there is less light than before. The diminution of light does not seem to be to an appreciable extent so as to cause damage to the plaintiff. The plaintiff should have opened sky-windows or other contrivances if he wished to carry on weaving in his house. The law laid down by the Chief Court for guidance in such cases is as follows:—

"In cases of this description the material question for decision "is, whether the building complained of caused a substantial dimi"nution of the light and air of which the plaintiffs had had for "twenty years the user, so as substantially to interfere with the "enjoyment or convenient occupation of the premises. * * * It "would not be sufficient, to give the plaintiffs the right to the "mandatory injunction sued for, that they should show there had "been some slight obstruction to the flow of light, but the plaintiffs "must prove that there has been a *substantial* diminution of light "and air." *K. Koosama and others* v. *T. Srinivasiengar* (1).

As the plaintiff has not made out a case such as is contemplated by the foregoing observations, I decide the 6th issue (2) against the plaintiff.

The defendant No. 1 appealed to the Chief Court

(1) 6 M. L. R., 105.

(2) 6. Whether the wall interfered with the plaintiff's enjoyment of the light to which he is entitled, and with his following his occupation as a weaver, and what damages, if any, is the plaintiff entitled to recover on account of such interference?

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against the decree of the Munsiff and the plaintiff filed cross-objections to the dismissal of his claim to have the wall removed as diminishing the light coming to his dwelling.

Mr. B. *Nunjundappa* for the appellant.

Mr. S. *Narasimha Iyengar* for the respondent.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows:—

This was a suit to establish the plaintiff's right of way to a *hittal*, to remove the obstructions which were raised by defendants and which prevented the plaintiff from access to the *hittal*, to remove a wall erected in the *angala* by the first defendant and for damages.

The Munsiff of Bangalore upheld the right of way to the *hittal* and decreed the defendants to remove the obstructions; and he awarded Rs. 5 damages to the plaintiff. The other relief prayed for by the plaintiff was disallowed.

The first defendant appealed from the decree so far as it confirmed the plaintiff's claim to go through his door and *hittal*. The plaintiff appealed from the decree dismissing the prayer for the removal of the wall erected in the *angala*.

The Munsiff did not annex to his decree a sketch of the house and *hittal* in dispute, and we were not able to ascertain, clearly and distinctly, what was the relief granted to the plaintiff and what grievance the appellant had. We had a sketch prepared by a Commissioner, and we forwarded it to the Munsiff, with a direction to mark thereon the way, the right to which was decreed to the plaintiff.

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The argument which was most earnestly pressed upon us by the appellant's advocate, was that there was no evidence at all that the plaintiff and his predecessors in title had openly and continuously used the way as a matter of right for twenty years. If the evidence was sufficient to establish a title, the right was interrupted more than eight or nine years ago, and therefore the suit was clearly barred.

We do not think that the plaintiff claimed an easement by prescription, and we are of opinion that it is a mistake to style the right claimed by the plaintiff an easement at all. The plaintiff did not allege in the plaint and he made no attempt to prove that his portion of the house and the defendants' portion of the house formed two distinct and independent tenements and that he was the owner of the dominant tenement. From the documents filed in the case, we gather that the houses of these parties formed one big house, which was occupied by plaintiff's vendors and by the defendants, and that the front door, the back-door, the *angala* and the *hittal*, were common to the joint owners. How and when the doorways and the *angala* and *hittal* came to be held in common, the record does not show. Whatever be the origin of the right, there can be no doubt that there was the joint right. The outer doorway is to this day common, and so also is the *angala*. The *hittal* and the way leading thereto were described as joint property in the conveyance executed to the plaintiff, and we see no reason to question the correctness of the description. The plaintiff, who rested his right upon the conveyance, claimed relief not on the ground of easement, but as one who held a joint interest with

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the defendants. It was not his case that the doorway and the *hittal* were the exclusive property of the defendants, and that a burden had been imposed upon it, by prescription or otherwise, for the convenient enjoyment of his portion of the house. The injury which he complained of was not a disturbance of his easement, but infringement of his right of ownership. A right in or to land is quite different from a burden imposed upon that land for the benefit of another land; and if these two different objects had been distinctly conceived by the Munsiff, he would have avoided that confusion which now mars his judgment.

The plaintiff's conveyance recites that his vendors enjoyed, in common with the defendants, the front and the back doorways, the *angala* and the *hittal.* The recital is found true in regard to the front doorway and the *angala*, and there seems no reason for disbelieving the remaining portion. The ownership being clear, the question is whether there is evidence of long continued hostile possession so as to extinguish the plaintiff's right. Before the plaintiff purchased the house his vendors had mortgaged it to defendant No. 2 and the latter was in possession. He had his own house and he is the first defendant's brother. Whether he exercised all the rights which his mortgagors had, or whether he enjoyed the property in any other manner he considered most convenient, there is no reason for saying that defendant No. 1 acquired a right by adverse possession as against the mortgagors.

The passage which has been blocked by the defendants at the points which we have marked *A* and

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B will be kept open by the defendants free from obstruction, so as to enable the plaintiff to pass through it to the defendants' open ground. To pass from the vacant site to the *hittal*, the Munsiff has allowed a way which has the effect of breaking the wall at the point *D*. The plaintiff said, in the course of argument, that he understood the Munsiff to have allowed him access to the *hittal*, through the doorway or opening marked *C*, and that he had no objection to pass accordingly. In modification of the direction made or suggested by the Munsiff (for the decree is not quite explicit on the point), we direct that the defendants do allow the plaintiff to pass through *C* from the vacant ground to the *hittal*. From *C*, the plaintiff has to pass through *F* to the *hittal*. Defendant No. 1 stated that it was in defendant No. 2's possession and that he himself had no objection to the decree. Defendant No. 2 not having appealed from the decree, the direction made by the Munsiff will stand good.

There is nothing to be said against the award of damages to the plaintiff. It is clear that the defendants prevented the plaintiff by their wrongful act from exercising his right; they were rightly made liable in damages and the amount decreed is, by no means, excessive. The result is that the Munsiff's decree is confirmed and the appeal made by defendant No. 1 is dismissed with costs, subject to the slight modification made in the last paragraph. In order that there may be no misunderstanding of the decree, it is hereby directed that the plan prepared by the Commissioner be annexed to our decree.

The plaintiff complains of the erection of a wall

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in the *angala*, and he contends in his appeal that the Munsiff ought to have ordered the defendants to remove it. The ground of his action was not that the *angala* being common to both parties, one of them alone had no right to erect a wall without the consent of the other; but that the erection of the wall diminished the supply of light to his portion of the house. The reasons given by the Munsiff for disallowing the prayer seem sound and there is no reason for reversing the decree. The cross-appeal is dismissed with costs.

Appeal dismissed with costs.
Cross-objections dismissed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge, and P. N. Krishna Murti, Judge.

THIMMIA (DEFENDANT No. 1) *v.* HIRINIAPPA (PLAINTIFF).*

1892 *April* 11.

Hindu joint family—Commensality, presumptions arising from—Documents in name or possession of elder brother—Onus of proof—Ejectment—Exclusive right.

Per THUMBOO CHETTY, C. J.—Where the fact is proved that for the past 30 or 40 years the plaintiff and defendant were living together in one house, the presumption is that they were living together as members of an undivided Hindu family.

If they were joint in food for 30 or 40 years the legal presumption is that their earnings were also thrown into the joint or common stock to admit of the joint requirements of the family being met out of the joint earnings or savings.

The plaintiff was the elder brother and, if he acquired any property, the presumption is that he did so by means of the joint savings or surplus funds common to both brothers. If, however, he alleges the property to be his own acquisition, the onus of proving his allegation lies on him.

*Appeal No. 98 of 1891 against original decree No. 704 of 1889 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 20th day of December 1890.

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The mere fact that mortgage or sale deeds were in the plaintiff's name or *kundayem* receipts or other documents were taken in his name does not prove that his brother's rights to the property were excluded. There is nothing unusual in the plaintiff as elder brother being allowed to have title deeds &c., in his own name. That documents are in his possession, that he carried on transactions in his own name, that he recovered rents does not prove him to be sole owner. As elder brother, he was apparently regarded as manager or head of the family and as such was allowed to carry on transactions in his own name and keep documents &c., in his own custody. No presumption adverse to the defendant can be raised from any of these circumstances.

Where, as in the present case, it is proved that both brothers were living together at the time the sale-deed was executed; that they were under no necessity to raise a loan for buying the house, and that the plaintiff had no funds of his own, the legal presumption arises that the purchase was made out of funds belonging to both the brothers.

Per KRISHNA MURTI, J.—I do not think that as between the parties to this appeal, the ordinary presumptions of Hindu law regarding the status of a joint Hindu family should be given effect to.

The object of the suit as laid by the plaintiff is to eject his brother, the defendant, on the ground that he is a trespasser.

On the evidence defendant No. 1 has proved joint possession of the house with the plaintiff. The plaintiff has not established his exclusive title to the house and the Munsiff is wrong in decreeing ejectment on this ground. *Chowdrappa* v. *Goorappa* (1) and *Baldeo Das* v. *Sham Lall* (2) do not apply.

Kisto Chunder Kurmokar v. *Rughoonath Kurmokar* (3) has been erroneously applied by the Munsiff. In the present case the ground of contention is not joint family or joint living but joint acquisition.

It is not sufficient for the plaintiff to produce the title deeds alone; he must prove how he obtained the money with which he bought the house. This he has failed to do; and the mere facts that the title deeds are in his name, that he repaired the house, and mortgaged the property do not help him. The evidence indicates that the defendant was living in the house in the assertion of his own right and not as dependent on his brother.

Per Curiam.—The plaintiff, not having established an exclusive right to the house in dispute is not entitled to a decree for ejectment.

(1) 6 M. L. R., 141. (2) I. L. R., 1 All., 77.
(3) 10 W. R., 29.

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THUMBOO CHETTY, C. J.—The plaintiff and defendant No. 1, who are the only parties to this appeal, are uterine brothers. They are living in the suit house, which was purchased in the plaintiff's name, on the 30th November 1882. The plaintiff sued to eject his brother from the house, on the ground that the latter was simply allowed to live in a portion of the house and had no right to the house.

The defence was, that both the brothers were undivided in interest, that the house was their joint property and that the plaintiff had no right to eject the defendant.

The Munsiff of Bangalore gave judgment for the plaintiff, holding that there was no community of interest between the brothers, that they lived separately in the same house, that the plaintiff purchased the house out of his own funds and that the defendant had no right to or any share in the house.

Defendant No. 1 has now appealed.

The main question for determination in this appeal is, whether the suit house is the self-acquisition of the plaintiff, or is the joint property of the plaintiff and defendant No. 1.

The plaintiff's father, Chikkanna, was the Shanbog of Seekotai, where the plaintiff, defendant No. 1 and his other brothers lived more than 40 years ago. After the death of the father, the sons left their native village in search of employment. All the brothers, except the plaintiff and defendant No. 1, lived separately. There was, however, no division among them, probably because there was no ancestral property. But the plaintiff and defendant No. 1 have been living in Bangalore for a long time. They were employed

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under certain mundidars. Ever since the suit house was purchased, *i. e.*, from 1882, the plaintiff and defendant No. 1 were living in that house. Even before 1882, the plaintiff and defendant No. 1 lived together in houses which were either rented or were under mortgage. The plaintiff's 6th witness (defendant No. 5 and the elder brother of plaintiff and defendant No. 1) whom the Munsiff considered to be a truthful and disinterested witness, deposed that the plaintiff and defendant No. 1 lived in Bangalore for the past 40 years and that they always lived in one house. This witness when examined on the 24th August 1889 in Mis. Case No. 412 of 1889, in connection with the claim preferred by the plaintiff for the release of this house which was attached in execution of a decree which one Kristnappah obtained against defendant No. 1, stated that the plaintiff and defendant No. 1 cooked food separately in the same house since two or three years. From this it is evident that prior to that they messed together. This is what defendant No. 1 himself alleges. He says that for the past 40 years he has been living with the plaintiff, and that since two or three years, owing to a misunderstanding between the female members of the house, there has been separate cooking. The plaintiff's 5th witness also supported defendant No. 1's statement, by admitted that when the plaintiff and defendant No. 1 lived in houses that were under mortgage, they lived together and messed together. The plaintiff in his examination stated that, before he purchased the suit house in 1882, defendant No. 1 never lived with him in any of the houses that were mortgaged to him. But this statement has been

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proved to be false by his own 5th and 6th witnesses. All the witnesses for the defendant deposed that the plaintiff and defendant No. 1 were living together in Bangalore for the past 30 or 40 years and this is borne out by the evidence of two of the plaintiff's witnesses, who were apparently regarded by the Munsiff as truthful and disinterested witnesses.

Now, in the face of the established fact, that for the past 30 or 40 years the plaintiff and defendant No. 1 were living together in one house, *i. e.*, in the suit house since 1882 and before that for about 25 or 26 years in houses that were mortgaged, the presumption is that the plaintiff and defendant No. 1 were living together as members of an undivided Hindu family. They were joint in food up to two or three years ago. There was admittedly no division or partition between them. Both were gomastas employed under mundidars and were earning something. If they were joint in food for 30 or 40 years, the legal presumption is that their earnings were also thrown into the joint or common stock, to admit of the joint requirements of the family being met out of the joint earnings or savings. The plaintiff was the elder brother and, as such, if he acquired any properties, we must presume that he acquired them by means of the joint savings or surplus funds common to both brothers. If the plaintiff alleges that the house is his own acquisition, the onus of proving his allegation lies on him. Now let us see what he has proved in this case. Including himself, the plaintiff examined eight witnesses. In his examination as his 1st witness, he stated that the mundidar, Dod Nursannah, under whom he was employed, made a present of Rs. 700 to him and

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that he purchased the suit house out of that sum. None of his witnesses supported him in this respect. There is not a particle of evidence to prove that he got Rs. 700 from his employer. It is not likely that such a large sum as Rs. 700 would have been paid in a lump *gratis*. Even if we assume that a large sum was paid by Dod Nursannah, he would not have paid it without entering the payment in his accounts. The plaintiff admits Dod Nursannah's accounts contain no entry of the payment. I am therefore not disposed to believe the plaintiff's allegation, that he obtained the Rs. 700 from Dod Nursannah either as a loan or present. Each of the brothers were earning about Rs. 15 a month and, during the period of 30 or 40 years they were living together, they could have easily saved about Rs. 1,000. In the absence of proof that plaintiff got the Rs. 700 from Dod Nursannah or others, we must presume that the purchase money paid as per Ex. *A* belonged to the brothers and represented their joint earnings.

In para. 9 of his judgment, the Munsiff remarks that the plaintiff's 6th witness supported the plaintiff's contention that the suit house was plaintiff's own acquisition. This is not correct. We must compare his statement in the claim case with that given in this case and take his evidence for what it is worth. In his cross-examination in this case, he stated—"I was not present when the plaintiff purchased the house. I don't know who paid or where the money came from." This shows that this witness had personally no knowledge as to how the Rs. 700 were obtained. In the claim case, while formally admitting that he had no right to the house, the witness very

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ingeniously stated—"He (plaintiff) can give me a share if he chooses." The evidence of this witness proves nothing. He does not know from where the purchase money was got. He could not positively assert that that amount belonged to the plaintiff exclusively, and the Munsiff is wrong in stating that the evidence of this witness proves the plea of self-acquisition put forward by the plaintiff.

The Munsiff next alludes to the evidence of defendant No. 2 being opposed to that given in the claim case. The evidence of defendant No. 2 is no doubt contradictory; but it will be seen from his examination in the claim case, that he was not present when the house was purchased, so that he also has no personal knowledge of the transaction. In this appeal, to which defendant No. 2 is no party, it is unnecessary to consider whether that defendant has any right to this house or not. We have only to decide the dispute between the plaintiff and defendant No. 1 and, as between them, we must hold that the plaintiff has not proved his plea of self-acquisition.

The Munsiff lays stress on the statement of defendant No. 1 to the effect that he and the plaintiff borrowed separately from their employers and paid their debts out of their pay. This apparently refers to petty debts now and then contracted by each, *i. e.*, debts unconnected with the joint family requirements. In the same deposition, defendant No. 1 states that, although he did not make any special contribution towards the purchase money mentioned in Ex. *A*, yet the whole amount was paid out of general funds. From this we may presume that, while the brothers liquidated their own petty debts, which each con-

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tracted independently of the other, they had also accumulated some of their savings and held them separately and appropriated the same for the mortgage and purchase of houses. The mere fact that in such transactions the mortgage or sale deed was executed in the plaintiff's name, or that the *kandayem* receipts or other documents were obtained by the plaintiff in his own name, does not prove that defendant No. 1 had no right to the property mortgaged or purchased. There was nothing unusual in defendant No. 1 having allowed his elder brother to have the title deeds &c., in his own name.

The Munsiff condemns very strongly the evidence of the defendants' witnesses as unworthy of credit. There is nothing in their evidence which is open to such a sweeping condemnation. Their main allegation, that the plaintiff and defendant No. 1 have been living together for the past 30 or 40 years is, as I have already shown, corroborated by the plaintiff's own witnesses (5 and 6), and, even if we exclude from consideration the whole evidence given by the defendants' witnesses, the admissions made by the plaintiff's witnesses are sufficient to support the allegation of defendant No. 1 that he was living with the plaintiff.

If the plaintiff had proved that he either borrowed or got as a present the Rs. 700 paid on Ex. *A*, then the burden would have been shifted on defendant No. 1 of showing that the plaintiff had other funds belonging to the family. Where, as in this case, it is proved that both the brothers were living together at the time Ex. *A* was executed; that they were under no necessity to raise a loan for buying the house; and that the plaintiff had no separate funds of his own, the

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legal presumption arises that the purchase was made out of funds belonging to both the brothers.

I attach little or no importance to the fact of the plaintiff having hypothecated the house to others, or to defendant No. 1 having attested Ex. *D.* Defendant No. 1 might have consented to the acts of the plaintiff and, as a token of his consent, he might have attested *D.* This would not deprive defendant No. 1 of the right he possesses to the suit house jointly with the plaintiff.

The title deeds being in the plaintiff's possession, and the plaintiff having recovered rents from tenants who occupied the house, does not prove that the plaintiff was the sole owner. As the elder brother he was apparently regarded as the manager or head of the family and, as such, he was allowed to carry on transactions in his own name and to keep documents &c., in his own custody. No presumption adverse to defendant No. 1 could be raised from any of the above circumstances.

On the whole, I am inclined to find that the plaintiff and defendant No. 1 were living together as members of a joint Hindu family, that the plaintiff has failed to prove that the suit house was his own acquisition, and that, as defendant No. 1 is jointly with the plaintiff entitled to the house, the plaintiff cannot exclude the defendant No. 1, much less seek to oust him. I would reverse the Munsiff's decree and direct that the suit as against defendant No. 1 be dismissed with costs incurred in this court and in the Munsiff's court.

KRISHNA MURTI, J.—I do not think that, as between the parties to this appeal, the ordinary pre-

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sumptions of Hindu law regarding the status of a joint Hindu family should be given effect to. They do not contend that they continued as members of a joint family. It is admitted that no family property was divided, but that the brothers parted to find separate means of living. Thus starting, these two brothers, who are now before this court, came to Bangalore, and at the time of the suit both are found to be living in the same house, though cooking separately. There is no evidence to prove that the parties lived together with the intention of thereby altering their status and of forming a joint estate with all its usual incidents. In the absence of clear proof I am unable to presume that a reunion between these two brothers alone was formed (*see* Mayne, sec. 456). The object of the suit laid by the plaintiff is to eject his brother the defendant on the ground that he is a trespasser.

The plaintiff alleges that the house is his own and that the defendant came into the house with his permission, while the defendant denies those facts and asserts a joint right to the house.

A good deal of oral evidence has been taken but, for the purposes of this suit, it is only necessary to find how and when the defendant came into the suit house. The plaintiff has adduced no evidence and indeed has stated his inability to prove his allegation, that the defendant begged of him permission to occupy a room and that he gave it only for that purpose. The Munsiff seems to be of opinion that, even if the plaintiff failed to prove any such permission, the plaintiff still is entitled to eject the defendant, as he has shown that he is the exclusive proprie-

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tor of the suit house. For this proposition of law, he has relied upon *Chowdappa* v. *Goorappa* (1) and *Baldeo Das* v. *Sham Lall* (2). The latter does not at all apply to the facts of this case, while the former is an authority for holding that, even if permission to occupy the house is not proved, exclusive title to the property entitles the owner to a decree of ejectment against a trespasser. In this case, the preponderance of evidence is certainly to the effect that the plaintiff and defendant No. 1 have been living together not only in the suit house, but even before they removed into it. I feel quite warranted, from this evidence, in holding that defendant No. 1 has proved joint possession of this house with the plaintiff. In other words, the plaintiff has not established his exclusive title to the house and the Munsiff is certainly wrong in decreeing ejectment on this ground alone.

With regard to the title of the parties, I am of opinion that the Munsiff has made an erroneous application of the ruling quoted from *Kisto Chunder Kurmokar* v. *Rugoonath Kurmokar* (3). That case is not at all analogous to the one before us. What the learned judge there decided was, that the fact of a family having been joint and that the members of such family lived together does not affect the force of the title deeds as evidence of ownership, and that if property is purchased by one member under such circumstances, the fact of the joint living affords no presumption as to the source of the purchase money. The facts of this case are not reported, but it cannot

(1) 6 M. L. R., 141. (2) I. L. R. 1 All., 77.
(3) 10 W. R., 329.

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be that the contending members were both in possession of the property in dispute as its joint owners or as its joint acquirers. The only facts assumed by the judge in that case are, that the title deed of the property in dispute was in the name of one only of the joint members of a family, who were all living together. In this case, the ground of contention is not joint family or joint living, but joint acquisition. If there are several members of a joint family and if property subsequently acquired has for its evidence of title a document in the name of one only of such members, the ruling quoted is an authority to hold that this fact alone does not raise any presumption as to the source of the purchase money, so as to affect the force of the title deed and that those who dispute the title as evidenced by the document are bound to prove the source of the purchase money. In the case before us, there is no question as to whether the family was joint or not. There is only one property in dispute and the possession of it is held by both the parties. If the title deed gives rise to a presumption of ownership on behalf of the plaintiff, there is also the presumption of right in favor of the defendant to be derived from his possession. (Evidence Act s. 110). In the circumstances of this case, it does not seem to be sufficient to produce the title deeds alone. It is incumbent on the plaintiff to prove how he obtained the money with which he bought the house. He must be presumed to be just before generous, and the fact that the defendant has been living in the house cooking separately even after his disagreement with the plaintiff, is a strong fact to indicate that the defendant was living in the house

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in the assertion of his own right and not as one depending upon the generosity or the kindness of his brother. The plaintiff has failed to prove that Nursannah gave him any gift of money. In the absence of such proof, the facts that the title deeds are in his name that he repaired the house, and that he mortgaged the property to others do not help him. On the whole, I am of opinion that the plaintiff has not established an exclusive title to the house in dispute and that he is not therefore entitled to a decree of ejectment against the appellant.

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The appeal must be allowed and the plaintiff's suit be dismissed with costs throughout.

Appeal allowed and suit dismissed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

A. NARANAPPA (PLAINTIFF) *v.* LUKSHMI DEVAMMA AND 7 OTHERS (DEFENDANTS).*

1892 *April* 11.

Hindu Law—Rights of widow—Rights of mother succeeding to son—Improper alienation—Waste.

The estate taken by a mother succeeding to her son is like that taken by a widow from her husband, and the incidents are the same. In either case the mother or widow is entitled to the possession, use and enjoyment of the property without restriction and she has a power of disposition qualified by the principles of Hindu law.

Without determining whether the plaintiff is next or immediate reversioner he is not entitled to a declaration that the alienations made by defendant No. 1 are invalid beyond her life-time unless he gives clear and cogent proof that they are contrary to the nature of her estate and unauthorized.

***Held*, that as the present plaintiff has failed to prove any specific act of waste or improper alienation on the part of defendant No. 1 and no exceptional cause has been shown to question the**

*** Appeal No. 197 of 1891 against original decree No. 4 of 1890 of Mr. C. Srinivasiengar, District Judge of Mysore, dated the 17th day of June 1891.**

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propriety of any of the arrangements made by her for the benefit of her daughter or daughter-in-law or that she has been guilty of any infraction of Hindu law or committed any waste or made any improper alienations, the plaintiff is not entitled to bring this action for declaratory relief.

The facts of the case are that Bukshi Narasappa died in the year 1878 leaving extensive property. Bukshi Narasappa's son having predeceased him, his widow Lakshmi Devamma (defendant No. 1) after his death adopted Narasingappa, son of the plaintiff. Narasingappa died in the year 1883 without issue. The plaintiff, Naranappa claimed thereupon the property derived from Bukshi Narasappa devolved upon Lakshmi Devamma as the adopted mother of the deceased Narasingappa and that he (the plaintiff) became the sole reversioner being the son of Bukshi Narasappa's uterine brother. He charged the widow with having made a gift of some of the property to her daughter defendant No. 2, of other property to her father defendant No. 3, and with having also made further alienations to the other defendants. He brought suit for a declaration that being the nearest reversioner he was entitled to succeed to the property and that the alienations were invalid so far as they affected his reversionary rights, being good only during the life-time of defendant No. 1.

The District Judge overruled an objection to the maintenance of the suit, holding that under the Specific Relief Act s. 42 and the illustration to that section a suit for a declaration that alienations by a widow are void beyond her life, is clearly maintainable: and concluded by dismissing the suit with costs. He held that the widow, defendant No. 1, succeeded to the property as the widow and legal heir of the

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Bukshi, and not as being the adoptive mother of the plaintiff's son: that such son was adopted with limited rights which did not interfere with the widow's estate during her lifetime: and that inasmuch as the adopted boy had died before succeeding to the property, the plaintiff was not in fact the nearest reversioner but a very remote one, whose interest would disappear on the Bukshi's daughter (defendant No. 2) leaving a son behind her. The District Judge also held that the property left by the Bukshi being all self-acquired and Mysore being a province governed by the Mitakshara law, it was fully competent to the testator to dispose of his property in any way he pleased, to postpone the adopted son's interest and to direct that the widow's estate should not be interfered with during her life: further that it is competent to the adopter and to the guardians of the adopted to agree upon terms which may govern the contract of adoption and such terms will be enforced by the court. Mayne's Hindu Law s. 180 and *Lakshmi* v. *Subramanya* (1). As to the alienations, he held that to the daughter to be of such a nature that a declaratory decree should in the discretion of the court be refused, as its effect under the circumstances was merely to accelerate the daughter's succession and put her by anticipation in possession of her life estate. *Bhupal Ram* v. *Lachma Kuar* (2): that with regard to the others, no act of waste had been made out, but it was open to the plaintiff, although only a remote reversioner, to question alienations to others than the daughter.

(1) I. L. R. 12 Mad., 490. (2) I. L. R. 11 All., 253.

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The plaintiff then appealed to the Chief Court.

Mr. *Narayana Rao* for the appellant.

Mr. *J. C. S. Lawrance* for the respondent.

The judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

We have given this case our best consideration and we agree with the District Judge in holding that the plaintiff is not entitled to any relief and that his suit is liable to be dismissed.

The question, whether the plaintiff is the immediate or first reversioner entitled to take the estate now in the possession of defendant No. 1 after her death, depends upon the construction to be put on the will of the late Bukshi Narasappa and upon the decision of another question, whether defendant No. 1 succeeded to the estate as the widow of her late husband or as the mother of her adopted son Narasingappa. We, however, deem it unnecessary to decide these intricate questions, which can only properly arise for decision after the death of defendant No. 1. It is an admitted proposition of Hindu law, on which there is no conflict of opinion, that the estate taken by a mother succeeding to her son is like that taken by a widow from her husband. The incidents which attach to the estate inherited by a mother or widow are the same. In either case, she is entitled to the possession, use and enjoyment of the property without restriction and she has a qualified power of disposition of it in a manner consistent with the principles of Hindu law regarding such dispositions.

The alienations made by defendant No. 1 are voidable at the instance of any one who is entitled to

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take the estate on the death of the female holder, if it can be shown that the alienations are improper and unauthorized by Hindu law. The question as to whether the plaintiff or the first defendant's daughter would be entitled to succeed on the death of defendant No. 1 need not, therefore, be decided in this case, for the purpose of determining who is the next or immediate reversioner of defendant No. 1. Assuming that the plaintiff has a right, as reversioner, to question the alienations said to have been made by defendant No. 1 as being prejudicial to his reversionary rights, he is not entitled to a declaration that the alienations by defendant No. 1 are not valid after her lifetime, unless there is clear and cogent proof that they are contrary to the nature of her estate and unauthorized, *i.e.*, that they are made for purposes not recognized by Hindu law.

The principal alienation, to which the plaintiff has taken objection, is the gift of certain immovable property made by defendant No. 1 to her daughter defendant No. 2. As remarked by the lower court, in para 25 of its judgment, the second gift in cancelment of the first is only in respect of a few small items of property. It must be remembered that defendant No. 1 was unmarried at the time of her father's death. Whether the estate passed first to Bukshi Narasappa's adopted son or to defendant No. 1, defendant No. 2 was entitled to have her marriage celebrated at the expense of her father's estate and to obtain a proper provision for her own maintenance, and it is not shown that what has been given to the daughter was more than what she would have obtained or what she was entitled to get either from her

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father or brother, taking the family property and circumstances into consideration.

The next act of defendant No. 1 that has been impeached is the lease of certain lands to her father, defendant No. 3. The District Judge has clearly shown, in para 26 of his judgment, that the lands were lying waste for a long time and that, by leasing them, defendant No. 1 has secured a fixed and permanent income to the family. This cannot be regarded as an act of waste or improper alienation.

The gift of two houses of small value was made to defendant No. 3 in pursuance of the wishes of the late Bukshi Narasappa. This, the lower court remarks, was not vigorously contested. Likewise the additional provision made for the maintenance and accommodation of the two widowed daughters-in-law of the late Bukshi.

The alleged sale of a house to defendant No. 5 was not enquired into, as defendant No. 5 died during the pendency of the suit and the plaintiff took no steps to bring on the record the legal heir or representative of this defendant.

The plaintiff has utterly failed to prove any specific act of waste or improper alienation on the part of defendant No. 1. No exceptional cause has been shown to question the propriety of any of the arrangements made by defendant No. 1 for the benefit of her daughter or the daughter-in-law of her late husband. It has not been proved that, in respect of the provisions made by defendant No. 1 and to which the plaintiff takes objection, defendant No. 1 has been guilty of any infraction of the Hindu law or has committed any waste or made any improper alienations so as to

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entitle the plaintiff to bring this action for declaratory relief. 1892

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We therefore affirm the District Judge's decree and dismiss this appeal with costs.

Appeal dismissed with costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

HUTCHA (DEFENDANT) v. VENKATA GOWDA (PLAINTIFF).*

1892 April 11.

Lease—Inadmissibility for want of registration—Admission of oral evidence to prove tenancy—Failure by plaintiff to prove his allegations—Admission by defendant—Proof of title in plaintiff other than as set up.

Per RAMACHENDRA IYER, J.—The point for determination is whether the Munsiff was right in ordering the plaintiff to deliver possession of the land to the plaintiff. That the plaintiff is owner is not denied by the defendant. The Munsiff made no error in appreciating the evidence and his decree should be upheld.

Per KRISHNA MURTI, J.—The oral evidence is discrepant inconclusive and unsatisfactory: nor is the Munsiff's appreciation of it correct. His finding cannot therefore be upheld that the relationship of landlord and tenant has been established between the parties; and he was wrong in applying the rule of estoppel to the case. Nevertheless, the defendant has not set up any right of his own, but clearly admits that the land belonged to the plaintiff, so there can be no question of the latter's title being superior and exclusive. If therefore the defendant has not established a right sufficient to entitle him to hold the land as against the plaintiff he is bound to give it up to the latter.

Following *Chowdappa* v. *Goorappa* (1) the plaintiff is entitled to a decree even though he failed to establish the lease on which he based the suit.

The defendant, having admitted the plaintiff's ownership and there being no conclusive proof of any right strong enough to postpone that of the plaintiff, there seems no objection to give a decree for the rightful owner to take possession of the land.

Per CURIAM —The lease was inadmissible in evidence, for want

* Appeal No. 209 of 1892 against original decree No. 555 of 1890 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 5th day of June 1891.

(1) 6 M. L. R., 141.

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of registration; but other evidence could be received to determine the relationship of landlord and tenant.

The Munsiff was right in giving a decree for possession to the plaintiff as rightful owner: and his decree should accordingly be confirmed.

This was a suit for ejectment. The plaintiff Venkata Gowda, alleged that the land sued for belonged to him and that he leased it by writing to the defendant, Hutcha, for cultivation, the latter agreeing to give it up to the plaintiff when required: that the arrangement had continued since April 1885 (when the defendant was let into possession) and as the defendant now refused to quit the land, the present suit was brought. The defendant pleaded that the lease was a forgery; that Kopay Gowda had given him a lease of the land in 1881 since which time he had been in possession.

The Munsiff remarks with regard to the defence—

"The defendant does not deny that the land belongs to the plaintiff's father. He only contends that the land having been mortgaged to Kopay Gowda it was leased to him by the mortgagee. He says he gave no written lease to Kopay Gowda."

Again—

"The defendant himself does not say that Kopay Gowda leased the land to him. He says that Kopay Gowda gave the land to Vencata, that he (the defendant) became a cultivator under Vencata and that he thereby came into full possession. It is thus clear that the defendant did not get any possession from Kopay Gowda himself."

The Munsiff held that the lease propounded by the plaintiff was of such a nature as to require registration—*Shambhut* v. *Ramajois* (1)—and was therefore inadmissible. Having found this, a decision as to its genuineness became unnecessary.

(1). 1 M. L. R., 20.

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He held further that, although the lease being rejected oral evidence of its terms could not be received, yet the status of the parties, the existence of the relationship of landlord and tenant, could be shown by oral evidence; and on the evidence before him decided as follows:—

> "I am therefore clearly of opinion that the plaintiff is the landlord and that the defendant is the tenant. I hold that the plaintiff it was who leased the land to the defendant and that the defendant is estopped from disputing the plaintiff's right and setting up another landlord. The decree will therefore direct that the plaintiff do recover possession of the land described in the plaint schedule with costs from the defendant."

The defendant appealed to the Chief Court.

Mr. *Alasingrachar* for the appellant.

Mr. *Bheema Rao* for the respondent.

The following judgments were delivered by the Chief Court:—

RAMACHENDRA IYER, J.—The point for determination is, whether the Munsiff was right in ordering the appellant to deliver possession of the land to the plaintiff. That the plaintiff was the owner of the land was not denied by the appellant. The evidence shows that it was one Linge Gowda who had possession of the land on behalf of the plaintiff till about eight years ago. The payment of assessment appears to have been made by the plaintiff. The defendant, who alleged that he had paid it, failed to prove it by production of the receipts, which he said he had left behind. On the whole, I think the Munsiff did not make any error in appreciating the evidence, and I would uphold the decree and dismiss the appeal with costs.

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KRISHNA MURTI, J.—The advocate for the appellant very properly conceded that the lease was inadmissible in evidence for want of registration and that the Munsiff was right in admitting other evidence to determine the relationship of landlord and tenant.

The question is, whether such a relationship has been proved by the plaintiff. The Munsiff seems to have attached undue weight to the evidence derived from the so-called *kandayem* receipts, which do not appear to have been proved. They are slips of paper, and, in the absence of clear proof of their genuineness, it is not right to base any finding upon them. Likewise, the fact that the defendant did not produce the *kandayem* receipts, which he said he had in his house but which he was not required or given an opportunity to produce, does not appear to militate against his case. His possession of the land during the last seven years has been admitted by the plaintiff, and if, by the production of the receipts referred to, the defendant had added his own proof to the admission of the plaintiff, his case would not have made any advance in his favour. The other evidence which the Munsiff considers conclusive is the testimony of Linge Gowda, whose connection with the field in dispute has been admitted by both the parties. He was the cultivator for several years, and the Munsiff believes his evidence that his landlord was the plaintiff. I would not have hesitated to accept the opinion of the Munsiff regarding the value of this evidence if he had not overlooked the fact that Linge Gowda admitted to being the father-in-law of the plaintiff, or, as the latter called him, maternal uncle.

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Such relationship in a villager detracts much from the impartiality of a witness and I cannot therefore accept this testimony as altogether without bias and trustworthy. One Rame Gowda, who has been examined as a witness, said that he had one-third portion of the land in dispute on lease and that the defendant had only the other two-thirds.

This evidence does not quite fit in with the case set up by the plaintiff who claims the whole. There is also difference in the evidence which has been adduced regarding the profits which the plaintiff obtained from the land. Some say that he carted *ragi* and *cholum*, while others make out that he received the money equivalent of the produce. If it is true that the plaintiff has all along paid the *kandayem*, this fact does not improve the case, as it is said that it is one of the terms of the mortgage under which Tope Gowda is said to be holding the land that the plaintiff should pay the *kandayem*. The other witnesses examined by the plaintiff are Munia, Mulle Gowda and Bore Gowda, and all of them say that the land sued for was cultivated both by Rame Gowda and the defendant. The evidence placed before the court by the plaintiff is not without blemish and I am not prepared to say that the Munsiff's appreciation of it is quite correct. Rame Gowda says that what had been given to him was taken back by the plaintiff. According to Mulle Gowda, one half was given to Rame Gowda and the other half to the defendant. It is thus evident that the oral evidence is discrepant, inconclusive and unsatisfactory. I cannot therefore uphold the finding of the Munsiff that the relation-

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ship of landlord and tenant has been established between the parties. It follows that the Munsiff was wrong in applying the rule of estoppel to this case, but it does not appear that the parties have in any manner been prejudiced by this wrong application of the rule.

The defendant has not set up a right of his own. All that he has pleaded is, that he got the lease of the land from Tope Gowda. In doing so, the defendant did not deny the right of the plaintiff. He clearly admitted that the land belonged to the plaintiff. As between him and the plaintiff it is obvious that there can be no question of the latter's title being superior and exclusive.

If, therefore, the defendant has not established a right sufficient to entitle him to hold the land as against the plaintiff, he is bound to give it up to him. In the case of *Chowdappa* v. *Goorappa* (1) it was held that, if the plaintiff could prove a good and valid title to his house, he was entitled to a decree for possession even though he might fail to prove his allegation that he had given permission to the defendant to live in the house. Following this rule, it seems that the plaintiff is entitled to a decree even though he has failed to establish the contract of lease on which he based the suit.

Tope Gowda, as whose lessee the defendant claimed to be in possession of the land, has been examined as a witness in this case and had notice of the suit. It was open to him under section 32 of the Civil Procedure Code, to have applied to the court to be made a party and for an adjudication

(1) 6 M. L. R., 141.

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of the mortgage right he has set up. To prevent a multiplicity of suits, the Munsiff ought to have made him a party and framed an issue regarding the genuineness and validity of the mortgage to Tope Gowda. But I am not inclined to help Tope Gowda in this suit as he has failed to take advantage of the opportunity which was available to him in the lower court. His evidence proves nothing, as he has no personal knowledge of the transaction and his witness Guruva Setty is contradictory and inconsistent. He is said to have stated "I never saw Venkata Thimme Gowda; Tope Gowda told me so. I was present when Venkata Thimme Gowda mortgaged the land to Tope Gowda. I attested the sale deed." The most that can be said of this evidence is that it is unmeaning. Tope Gowda says that the mortgage was to his father. It is impossible that, on such evidence, any finding in favor of Tope Gowda can be based.

The case therefore stands thus:—

The plaintiff has failed to establish the contract of lease but there is an admission of his ownership of the land in dispute by the defendant. He alleged that Tope Gowda gave the land to him and there is no conclusive proof on record that Tope Gowda has a right strong enough to postpone that of the plaintiff. Under the circumstances, there seems to be no objection to give a decree for the rightful owner to take possession of this land, and in this view of the case, I uphold the decree of the Munsiff and dismiss this appeal with costs.

Appeal dismissed with costs.

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Before T. R. A. Thumboo Chetty, Chief Judge, and P. N. Krishna Murti, Judge.

1892 *April* 22.

SATHYA DHEERA SREE PADANGALAVAROO (PLAINTIFF) *v.* GOOLI BALACHAR SINCE DECEASED BY HIS SONS AND LEGAL REPRESENTATIVES GOORURAYA CHAR AND TWO OTHERS, MINORS, BY THEIR GUARDIAN SOOBA ROW (DEFENDANTS).*

Mutt—Grant of trust property—Consideration—Acquiescence—Nature of suit.

The Guru of the *O* Mutt in 1842 executed a deed to his sons granting them a village, mutt and brindavanams subject to the performance of puja and other conditions therein specified. Through them it came to the defendant's father, and after his minority, the property having in the meantime been managed by the *O* Mutt for and on his behalf, it was by a subsequent deed restored to him to be held and enjoyed in accordance with the terms of the original grant. The suit was brought by the present Guru of *O* Mutt on the allegation that the terms of the grant were not fulfilled, and to recover the property on the ground that the defendant had broken the conditions of the grant and was guilty of mismanagement and misconduct.

Held, that the fact that the grantee undertook to manage the affairs of the mutt, to look after the brindavanams, to perform ceremonies, &c., as required by the grant constitutes a sufficiently good and valid consideration.

Further, that whether the grant was such as the then Guru could have legally sanctioned or not, the present plaintiff having acquiesed in the arrangement and allowed the defendant to appropriate the produce of the property for the purposes mentioned in the grant could not now refuse to be bound by it; the more so as the present suit is not based on the inalienability of the property granted or the incompetence of the Guru to make the grant; but on the ground that the terms of the grant were not fulfilled and that the defendant had by his misconduct and mismanagement rendered himself liable to be divested of the property.

The suit was brought to recover from the defendant certain property held in trust for the Oothraji

*Appeal No. 203 of 1891 against original decree No. 65 of 1890 of Mr. T. Narahari Rao, District Judge of Nundidroog, dated the 29th day of May 1891.

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Mutt on the ground that he had by his misconduct and mismanagement forfeited the right to hold the same. The District Judge found that the defendant and his ancestors had been holding the property since the year 1842 under five successive Gurus of the Oothraji Mutt who had acquiesced in and ratified the arrangement and that no misconduct or mismanagement had been proved. The suit was accordingly dismissed with costs. The plaintiff appealed to the Chief Court.

Mr. *Raja Row* for the appellant.

Mr. *Ramaswamy Iyer* for the respondent.

The judgment of the Chief Court (THUMBOO CHETTY, C. J., and KRISHNA MURTI, J.) was as follows:—

The plaintiff, who is Guru of Oothraji Mutt, sued to recover possession of the village of Gooli Harivi in Tumkur taluk and a mutt, including certain brindavanams situate in Mysore taluk.

The cause of action was thus stated in the plaint:—"That the defendant was appointed by the mutt to worship at the said brindavanams and to manage the affairs of the mutt at Mysore generally and was accordingly, about 8 or 10 years ago, placed in possession of the village described in the schedule hereunto annexed, with instructions to appropriate the produce of the said village, or its value, for the purpose of feeding Brahmins and other religious charges connected with the worship of the said brindavanams. That up to the 28th December 1888 the defendant accordingly did appropriate the produce of the said village, as set out in para. 3 of this plaint; but, about that date, he became indifferent in the said worship and was guilty of acts

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of misconduct and mismanagement of the properties of the mutt and declared that he was the absolute owner of the said properties, and that the mutt had no right, title or interest in any of them and the said village. Owing to the aforesaid acts of misconduct and mismanagement, the plaintiff removed the defendant from the office to which he was appointed, but the defendant refuses to deliver up possession of the village and the mutt including the brindavanams to the plaintiff. The cause of action accrued to the plaintiff on or about the 28th December 1888."

The suit was laid against Gooli Balachar, who died some time subsequent to the institution of the suit; and his sons are the present defendants. The defence was that one Gooli Balachar was the Guru of Oothraji Mutt until about 1842; that he executed the deed marked Ex. *VI*, dated 13th May 1842, in favor of his sons, Venkataramanachar and Venkatachar; that the village, mutt and brindavanams in suit came to their possession and enjoyment under that document, subject to the performance of the puja and other conditions therein specified; that one of the two sons of Gooli Balachar, the said Venkatachar, died issueless; that subsequently Venkataramanachar died in 1851, when the present defendant's late father, Balachar, was adopted, and, during his minority, the Oothraji mutt managed the village, &c., for and on his behalf and paid over the income that remained, after defraying the expenses of the charities indicated in Ex. *VI*, for the maintenance of Balachar and his mother; that, in 1882, the village was restored to the said Balachar as per *yadi* (Ex. *A*) dated 29th October 1881 to be held and en-

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joyed in accordance with the terms of the original grant (Ex. *VI*); that the puja, &c., are being regularly performed and that the plaint allegations, as to misconduct and mismanagement, are false.

The District Judge found that the defendant and his ancestors have been holding the village and brindavanams in dispute since 1842 under Ex. *VI*, that five successive Gurus of the plaintiff Mutt acquiesced in and ratified the arrangement made in 1842; that no misconduct or mismanagement was proved against the defendant's father; and that the plaintiff had, therefore, no right to take possession of the village, &c. The suit was dismissed with costs. The plaintiff has preferred this appeal.

The appeal was ably argued by Mr. Raja Row. He disputed the genuineness of Ex. *VI*, and contended that, even if it were a genuine document, the then Guru was incompetent to make the alienation as being opposed to the terms of the grant of the village by Government to the Mutt; that, as there was no necessity or consideration for the alienation, it was invalid and therefore not binding on the alienor's successors, much less on the present Guru, the plaintiff; and that, granting the alienation was binding on the plaintiff, the breach of the conditions specified in Ex. *VI* and the misconduct and mismanagement on the part of the defendant's late father gave the plaintiff a cause of action and entitled him to put an end to the original arrangement.

It would be convenient to dispose of the questions of fact raised in the plaintiff's appeal first, before considering the questions of law involved in the suit.

Ex. *A*, which is admitted by the plaintiff, confirms

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the original grant of the suit village to the defendant's late father Balachar. It refers to a previous ಪತ್ರ; and, according to the defendant's 4th witness, who swears that he was present when the grant was made under Ex. *VI*, that ಪತ್ರ is Ex. *VI*. The document bears every appearance of genuineness. It is more than 30 years old and the 2nd witness for the defendant, who is a respectable and trustworthy witness, deposes to having seen this document (Ex. *VI*) in 1869, when it was produced before the then Palace Comptroller and read to him by this 2nd witness. It was also produced before the Munsiff of Tumkur in 1884, when there was no dispute between the plaintiff Mutt and the deceased defendant Balachar. The document is shown to have been in existence long before any disputes arose between the parties. It was followed by possession and enjoyment on the part of the grantees for a period of nearly half a century, and according to the admission contained in the plaint, the village, which was for some time under Mutt management during the minority of Balachar, was, on his attaining majority, restored to him in 1881—82, as stated in Ex. *A*, to be enjoyed in accordance with the terms of the "ಪೂರ್ವಪತ್ರ" or "previous document", which is proved to be no other than Ex. *VI*. The strongest argument put forward against the genuineness of Ex. *VI* is that, if it was in existence on the date of Ex. *A*, it would have been particularly referred to in Ex. *A*, giving the year, month and date thereof. The plaintiff's 5th witness stated that Ex. *VII* was the document that was produced and referred to when Ex. *A* was executed. If so, it may be asked why its date was not inserted in Ex. *A*.

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It is evident that the writer of Ex. *A* for some reason or other, omitted to insert the date of the "poorva pathra". Ex. VII cannot be the "poorva pathra". It is an order issued by the Mutt to one Seshagiri Krishnachar, who was in possession of the suit village on behalf of the late defendant. It does not fall under the category of "pathra".

The remarks made as to the demeanour of the plaintiff's 5th and other witnesses by the learned judge who tried the case show that these witnesses have not given their evidence in a straightforward and truthful manner, and their statements or opinions formed on a comparison of the signature and handwriting in Ex. *VI* with other admitted documents, cannot be implicitly relied upon. The District Judge has given cogent reasons for holding that Ex. *VI* was a genuine document and that it was the document referred to in *A*. This finding must be upheld.

Then as regards the alleged misconduct and mismanagement imputed to the late defendant Balachar, it must be remembered that no specific acts of misconduct, &c., are set forth in the plaint and there is no reliable evidence to support the general allegations made in the plaint. On the contrary, the evidence of some of the plaintiff's own witnesses show that those allegations have no foundation in truth.

The plaintiff's 7th witness, Putta Kosachar, stated that for eight years the worship has been neglected, the feeding has been discontinued and nobody has been looking after the brindavanams. This witness is directly contradicted by the 8th witness, Ramgiri Venkobachar, who deposed as follows:—"Puja is going on regularly. So far as I know there is

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nothing to complain of in the matter of worship, burning lamps, &c.". The 1st witness, Purushotama Char, the plaintiff's agent, was also obliged to admit that there was no cessation in the performance of the puja. The plaintiff's 5th witness alleged that feeding has been discontinued for six years, whereas the 1st witness stated that the defendant neglected to feed Brahmins only for three years past. The principal feeding or "samarathanai" which takes place twice a year is, it is admitted by the plaintiff's 9th witness, regularly continued. It is the daily feeding that is said to have been discontinued. According to the plaintiff's 5th witness the Mutt servants and three or four strangers ought to be fed daily; but none of the past or present servants has been called to prove that there was no such feeding. The Mutt accounts, showing what has been done during the time the village was managed for the defendant's father and how many persons used to be fed daily, have not been produced. They are said to have been lost. The 1st witness was unable to give the name of a single person who was refused feeding or accommodation. The 8th witness, Ramagiri Venkobachar, admitted that such persons as could eat in the defendant's house were actually fed by him. The 9th witness, Balachar, admitted that he and another were fed daily by the defendant for five or six years when he was doing puja, and that one Venkobachar was the present pujari. The deceased defendant, in his examination, swore that the puja, feeding, &c., have been regularly carried on; and but for the misunderstanding that arose between the Mutt people and the late defendant just about the time this suit

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was laid, Balachar would not have been found fault with. The evidence offered for the plaintiff is replete with discrepancies and the admissions which the plaintiff's witnesses were reluctantly obliged to make prove that the defendant did not misconduct himself in any manner and did not disclose any indifference or neglect in looking after the brindávanams or carrying on the charities in accordance with Ex. *VI* and Ex. *A*. It was alleged that the Mutt building and brindavanams were in a dilapidated condition. There is absolutely no evidence to support this allegation. The late defendant was in the Mutt personally looking after the brindavanams for about twelve years as admitted by the plaintiff's 5th witness. The 10th witness, Srenivasachar, admitted that the brindavanams were now in the same condition in which they were many years ago. There is nothing to show that either the Mutt buildings or the brindavanams are out of order. The plaintiff's advocate in the course of his arguments represented to the court that the deceased defendant had converted the Mutt into a dwelling-house and polluted the sanctity of the place, and thereby rendered himself unfit to be entrusted with the management of the charities. None of the plaintiff's witnesses specially refer in their evidence to this alleged disqualification, and there has apparently been no remonstrance against the defendant's father living in the Mutt, during the twelve years previous to this suit.

Having now disposed of the questions of fact, the next point for consideration is whether the grant made as per Ex. *VI* and confirmed by Ex. *A* was

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binding on the present Guru of the Oothraji Mutt. It was contended, in the first instance, that there was no consideration for the grant. The fact, that the grantee undertook to manage the affairs of the Mutt, to look after the brindavanams, to perform or cause to be performed Hastodaka Annadhana, the Samaradhanai, &c., as required in Ex. *VI* and Ex. *A*, constitutes a sufficiently good and valid consideration for the grant. The grantee was put in possession of the village, and allowed to appropriate the income subject to his carrying on the charities and other prescribed services. It was a conditional grant made in consideration of the grantee undertaking the duties and responsibilities connected with the performance of certain charities connected with the Mutt, and it could not be said that it was devoid of consideration. There was apparently no alienation giving away the property absolutely to the grantee. The grant was subject to the performance of certain duties and conditions; and the late defendant, in his examination, clearly admitted that he was bound by the terms of Ex. *VI* and Ex. *A*, and that if he had no heirs, who could act up to the conditions of the said documents, the estate must revert to the Mutt. Whether the management under Ex. *VI* and Ex. *A* was such as the then Guru of the Mutt could have legally sanctioned or not, it is quite evident, from the tenor of the present plaint, that the plaintiff, the present Guru, also acquiesced in the arrangement, and allowed the late defendant to appropriate the produce of the suit village for the purposes mentioned in Ex. *A*. This suit was not brought to set aside the original

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grant to the defendants' ancestors on the broad ground that the plaintiff's predecessors in title were incompetent to make the grant and that the so-called alienation was illegal and invalid for want of necessity and consideration, but it was brought to recover the properties entrusted to the defendants' father on the special allegation, that the terms of the grant were not fulfilled and that the father of the defendants was guilty of misconduct and mismanagement. The plaint and pleadings in this case do not raise the broad question, as to the inalienability of the village, &c., which the Guru of Oothraji Mutt holds in trust for the Mutt in his capacity of Guru. The question raised by the plaint is simply whether the defendants' father had by his misconduct and mismanagement rendered himself liable to be divested of the properties entrusted or given to him under the terms of Ex. *A* and Ex. *VI.* No misconduct or mismanagement has been proved, and the suit, in the form in which it has been brought, on the particular allegations made therein which have been shown to be false, is liable to be dismissed.

The question of limitation does not properly arise in this case and it is therefore deemed unnecessary to decide it.

This appeal is dismissed with costs.

Appeal dismissed.

1892
April 22.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

KODANDA RAMA SHETTY (DEFENDANT No. 2) *v.* GUNJEE NARASIMHAYA (PLAINTIFF).*

Lease—Attestation—Privity of contract—Joint liability—Collusion—Illegality.

A witness to a lease is not bound by it nor does the mere fact

* Appeal No. 226 of 1891 against original decree No. 2 of 1891 of Mr. C. Srinivasiengar, District Judge of Mysore, dated the 22nd day of July 1891.

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that he attested it impose on him a joint liability. There is no privity of contract between him and the lessor; and he is not bound to restore the premises to the lessor, although he may have been occupying it together with the lessee.

There being nothing to show that the witness regarded himself as the lessee, the mere fact that he vacated it in favour of the sons of a co-defendant shows no collusion on his part; nor in the absence of liability on his part is his act in so leaving the premises illegal. By vacating the premises after notice from the lessor he saved himself from liability.

This is a suit for ejectment. The defendants are two brothers, who sold certain properties, including the house sued for, to the plaintiff in consideration of a debt due to him and of his paying off other creditors of theirs. At the time, the defendants were living in the house, and defendant No. 1 executed a lease thereof to the plaintiff for six months which was witnessed by defendant No. 2. Defendant No. 1 vacated the house after three months leaving his brother, defendant No. 2, in it; the latter remained until he got a notice from the plaintiff (lessor) to vacate, which he did but did not restore possession, and it would appear that subsequently the sons of defendant No. 1 entered. Possession was not given to the lessor (plaintiff) by either defendants; hence the suit.

The District Judge decreed ejectment, damages and costs against both defendants.

Defandant No. 2 appealed to the Chief Court.

Mr. *B. Nunjundappa* for the appellant.

Mr. *S. Ramaswamy Iyer* for the respondent.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows:—

The only question which was argued before us related to the liability of defendant No. 2 to pay rent

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for his occupation of the house. Granting that defendant No. 2 was ill-advised in resisting the claim of the plaintiff for possession of the house, it is difficult to see how that contention can affect his liability under the lease or for holding over in the house after the term of the lease expired. The District Judge was apparently labouring under a confusion of ideas in this respect; for on page 6 of the printed book, we find that in one place (about line 6) he says that they (the defendants) "constituted themselves the tenants of the plaintiff. One of them being the head of the family, the plaintiff obtained a lease from him. The other attested the instrument." Then about line 40, he adds "To my mind it is perfectly clear that defendant No. 1 first removed from the house leaving defendant No. 2 in it and that defendant No. 2 afterwards vacated it in favor of defendant No. 1 and his sons and not of the plaintiff." The second of these findings seems to throw light on the first and indicate that the lease did not create a joint tenancy. In all such hotly contested cases, we must be prepared for a little exaggeration on both sides and a false defence, if set up by a party, should not blind us to the truth which binds him. The circumstances which preceded this lease show clearly that both the brothers acted independently of each other. Indeed, it is not disputed that defendant No. 2 executed a release in favor of defendant No. 1 who it was that conveyed the property to the plaintiff. This transaction does not show certainly that the brothers acted jointly as if they had a joint right. Then again, the lease was executed by defendant No. 1 alone and the District Judge is right in holding the object of

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the lease was, while it afforded the defendants some convenience before they could shift into another house, that it perfected the title of the plaintiff by the legal transfer of possession. But the party who really negociated with the plaintiff was defendant No. 1. The fact that defendant No. 2 attested the lease does not impose upon him a joint liability. The purpose of this attestation was obviously to strengthen the effect of the release and the conveyance executed by defendant No. 1 in his sole name. It is an error to presume that being the head of the family, defendant No. 1 executed the release both for himself and defendant No. 2. As has already been shown, the effect of the previous release is to sever their joint status. There is nothing to show that defendant No. 2 regarded himself as the plaintiff's lessee. As the District Judge has found, he vacated in favour of the sons of defendant No. 1. This does not in itself indicate any collusion or fraud. He was living with his brother defendant No. 1 who had left the house and gone away elsewhere. He received a notice from the plaintiff and within a reasonable time after the receipt of such notice of which he gave intimation to the plaintiff, he left it and the house was taken possession of by the sons of defendant No. 1. It may be that defendant No. 2 was aware that the house would be so taken up, but in the absence of a liability which he owed to the plaintiff, we see nothing illegal in the act of defendant No. 2. As far as he was concerned, he vacated the house and he did not certainly object to the plaintiff taking possession of it. As he was no party to the lease,

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he was not bound to restore the house to the plaintiff; and to save himself from any liability after he received the plaintiff's notice he vacated the house and went away. In this view, all that part of the evidence which refers to the occupation of the house by Mr. V. N. Narsim Iyengar does not seem to bear on the case at all. As contended for by the appellant, he was no party to the lease and there is no privity of contract between him and the plaintiff. The District Judge's finding that the lease was joint cannot be upheld by us, and according to his other finding, defendant No. 2 left the house shortly after he received the notice from the plaintiff. It is clear to our minds that, under these circumstances, defendant No. 2 incurred no liability in favour of the plaintiff and that part of the decree which imposes joint liability for the payment of the rent on defendant No. 2 must be reversed with proportionate costs. The appellant will get his costs in this court.

Appeal allowed.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 *April* 22.

H. MANNARIAH (PLAINTIFF) *v.* RANI DEVAMMAJI AND OTHERS (DEFENDANTS).*

AND

RANI DEVAMMAJI (DEFENDANT NO. 1) *v.* H. MANNARIAH (PLAINTIFF).*

Limitation—Acknowledgment—Limitation Act (XV of 1877), s. 19 —Agency—Evidence.

The cause of action arose in 1888 and the suit was filed in 1890. The plaintiff alleged there were acknowledgments written in 1888

* Appeals Nos. 298 and 381 of 1891 against original decree No. 576 of 1890 of Mr. B. Ramaswamiengar, Additional Munsiff of Bangalore, dated the 16th day of September 1891.

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by *S* an agent of the defendants. His evidence was—"I am not aware of the defendants having appointed *S* as their agent. They appointed him to do certain things in my presence. The acts he was to do were to write letters, to recover moneys and to accompany them wherever they go. This was about 5 years ago. I have no personal knowledge of *S* being now with the defendants. I last saw him about a year ago."

Held, this evidence does not prove that *S* was agent of the defendants in 1888 and that he had any authority to make an acknowledgment of their liability. The only other evidence is that of defendant No. 1, who was not present when the letters were written, and does not know under what circumstances and upon whose authority they were written.

There being no legal acknowledgment such as to satisfy the requirements of s. 19 of the Limitation Act, the suit is barred and must be dismissed.

This was a suit brought to recover money lent and the price of goods sold by the plaintiff to the defendants at Bangalore in May 1885 or thereabouts. The plaintiff alleged that defendant No. 1 was the managing member of the family, that all the defendants were living together and the debts were jointly contracted for the benefit of the family. He also alleged that the suit was taken out of limitation by reason of letters (Exs. *H* and *I*) written in March and September 1888 by one Sooriah as agent for the defendants, containing admissions of liability. The suit was filed apparently in August 1890.

Defendant No. 1 is daughter of the late Linga Rajah of Coorg whose lineal descendants are said to be residing at Benares. Her husband, Chinna Basappaji, is a Polygar of Coorg and she has estates there at Appagola. Defendant No. 2 is her daughter, the wife of Veerappa Naik of Hagalavadi; and defendants Nos. 3 and 4 are sons of defendant No. 2.

At the trial defendant No. 1 bore out the allegations of the plaintiff, stating among other things

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that Sooriah was agent of herself and all the other defendants. The Munsiff however, for reasons given, thought her evidence was not entitled to that amount of consideration and weight which it would otherwise have, having regard to her position in the family, and inclined to the opinion that she was supporting the plaintiff to the detriment of the other defendants through personal feeling against them. There was no other evidence of Sooriah's agency, which the other defendants denied. The Munsiff therefore concluded that Sooriah was authorised to write the letters Exs. *H* and *I* by defendant No. 1 as her agent only, he being a man in her employment. He held these letters to contain admissions of debt sufficient to take the case out of the statute and accordingly gave a decree against defendant No. 1. As to the other defendants, the Munsiff held that they were not jointly liable and that the suit was barred, so dismissed the plaintiff's claim against them.

The plaintiff appealed to the Chief Court against the dismissal of his suit as against defendants Nos. 2, 3 and 4.

Defendant No. 1 appealed to the Chief Court against the decree passed against her.

Mr. *T. S. A. D'Cruz* (for Mr. *J. C. S. Lawrance*) for the plaintiff.

Mr. *H. Lubeck* for the defendants.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows:—

This was a suit for money lent and for the price of goods supplied by the plaintiff to the defendants in May 1885. The suit was filed in September (?) 1890. It was alleged by the plaintiff that there were two

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letters written by the defendants through their agent in March and in September 1888, acknowledging their liability to pay the debt, and that the suit, which was filed within three years from the dates of the said letters, was not barred by limitation.

The Munsiff gave a decree against defendant No. 1 alone, for the money sued for.

The plaintiff has appealed against the decree, dismissing the suit as against the other defendants. Defendant No. 1 has appealed, on the ground that the suit was barred by limitation.

The question of limitation is the first question we have to determine. The letters alleged to have been written by the agent of the defendants have been marked as Ex. *H* and Ex. *I*. It may be that they are genuine and that they were written by Sooriah, as alleged by the plaintiff. But the point is whether the said Sooriah was an agent who had authority to bind the defendants by his acknowledgments. Upon this point, we have only the evidence of Rani Devammaji and of the plaintiff. Rani Devammaji was not present when the letters were written and she did not know under what circumstances and upon whose authority they were written. The evidence given by the plaintiff as to the power of the agent is as follows:— "I am not aware of the defendants having appointed Sooriah as their agent. They appointed him to do certain things in my presence. The acts he was to do were to write letters, to recover moneys and to accompany them wherever they go. This was about five years ago. I have no personal knowledge of Sooriah being now with the defendants. I last saw him about a year ago in the Bangalore City Railway

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Station". This evidence does not prove that Sooriah was an agent of the defendants in 1888 and that he had their authority to make an acknowledgment of their liability. There being no legal acknowledgment such as to satisfy the requirements of section 19 of the Limitation Act, we must hold that the suit, which was filed in 1890, was barred. We dismiss the plaintiff's appeal with costs. The first defendant's appeal is allowed with costs throughout.

Appeal of plaintiff dismissed.
Appeal of defendant No. 1 allowed.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

SRINIVASIENGAR (PLAINTIFF) v. NANJUNDA BHATTA (DEFENDANT No. 2).*

1892 *May* 30.

Recovery of land—Minority—Fraud—Setting aside revenue sale —Limitation—Limitation Act (XV of 1877), s. 7; Schedule II, Art. 12 and Art. 95.

The plaintiff having attained his majority on the 6th October 1887 sued on the 2nd March 1891 to recover land purchased, from his alleged guardian by defendant No. 1 in August 1882, and by defendant No. 2 in July 1887 at a sale for revenue-arrears confirmed before the 3rd October 1887. He alleged fraud, which both Courts found not proved.

Held that, there being nothing to show the plaintiff had by means of fraud practised by the defendants been kept in ignorance of the revenue sale, he cannot claim the benefit of the Limitation Act, s. 18; and Schedule II, Article 95 does not apply to the case.

The suit is virtually to set aside the revenue sale, and until that is set aside the plaintiff cannot get back his land. The period of limitation prescribed by the Limitation Act is that in Schedule II Art. 12, one year from the time the sale is confirmed. It was confirmed in October 1887, in which month also the plaintiff attained his majority. He had therefore under Art. 12 of Schedule II

* Appeal No. 289 of 1891 against original decree No. 117 of 1891 of Mr. S. Vardarajaiengar, Munsiff of Tumkur, dated the 21st day of September 1891.

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or under s. 7, of the Limitation Act, one year from that date to bring his suit. Not having brought it till March 1891, it is barred.

Per KRISHNA MURTI, J.—If the land had remained with defendant No. 1 without passing on to defendant No. 2, there would have been no difficulty in deciding that the transfer was void *ab initio*, having been alleged to have been made by a minor, and that the suit was within time as it was for the recovery of land and was laid within twelve years from 1882, when the alleged transfer took place.

This was a suit for recovery of possession of certain land, which the plaintiff claimed to be his ancestral property. The plaintiff attained his majority on the 6th October 1887. Defendant No. 1 claimed to have purchased the land in August 1882 from the plaintiff represented by his maternal grand-uncle. Defendant No. 2 claimed to have purchased the land at a revenue sale for arrears of revenue, which sale was confirmed before the 3rd October 1887; and which took place on the 28th July 1887, since which date he (defendant No. 2) has been in possession and enjoyment of the land. The plaintiff endeavoured to set up fraud. He alleged in his plaint that in September 1889 he first came to know that the land was his ancestral property and that defendant No. 1 had taken wrongful possession of it in 1882 fabricating a razinama as if executed by the plaintiff. It was, however, held that there was no evidence of fraud and that the sale was genuine. The suit was filed on the 2nd March 1891. The Munsiff held the claim barred by limitation and dismissed the suit. He ruled—

"The plaintiff attained his majority on the 6th October 1887. "If he wanted to get the patta made by Government in the 1st "defendant's name or the sale made in the 2nd defendant's name "cancelled he ought to have brought the suit before 6th October "1890."

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The plaintiff appealed to the Chief Court.

Mr. *L. Srinivasiengar* for the appellant.

Mr. *D. Vencataramiah* for the respondent.

The following judgments of the Chief Court were delivered :—

KRISHNA MURTI, J.—The plaintiff in this suit sued the defendants for the recovery of land bearing Survey No. 125 in the village of Amanikere of Gubbi Taluk.

He alleged that the land was his ancestral property, that he was a minor till the 7th October 1887, that in the month of September 1889 he discovered that this land which was his had passed into the possession of the defendants, and that they had no right to retain it.

The suit was filed on the 2nd March 1891 and the cause of action was laid in September 1889.

Defendant No. 1 pleaded that he obtained the land by a transfer from the plaintiff with the consent of his guardian; but that his interest had passed away from him, as in a revenue sale on account of arrears of land-revenue due by him, the land in suit was bought by defendant No. 2 and was ever since held by him.

Defendant No. 2 also pleaded the sale above mentioned.

The transfer to defendant No. 1 was in 1882. The revenue sale was in September 1887. The exact date of the confirmation of this sale is not clear from the records but on the 3rd October 1887 the balance of the purchase money was recovered from defendant No. 2 and the receipt recites that the sale had been confirmed by the Deputy Commissioner before that date.

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The date of the cause of action given in the plaint is apparently wrong, and Munsiff Varadaraja Iyengar did not think it necessary to examine the plaintiff on that point and ascertain correctly the proper date. He does not seem to have understood the real contentions involved in the case. Although he has held that the plaintiff's suit is barred yet the reasons he has given are not quite to the point. The enquiry into the case has been very superficial. It is surprising that any evidence should have been taken regarding Ex. 2 which was neither filed in any revenue office nor acted upon by any of the parties. Likewise the admission of other razinamas and transfers executed by the plaintiff is illegal. The fact that the plaintiff tendered razinamas in other instances is quite irrelevant and the analogy attempted to be established cannot in any manner affect the parties to this suit. On the whole the trial is very unsatisfactory and it is not creditable to Munsiff Vardarajaiyengar.

The first point which has to be decided in this case is, when did the plaintiff's minority, or in other words his legal disability to sue, cease? On this point the finding of the Munsiff seems to be correct. Even the witness who was examined by the defendants referred to the plaintiff's maternal grandfather, Venkatachar, as being well informed on the subject and he gave the date of the plaintiff's birth as 6th October 1869. This evidence seems to be quite reliable and I accept the Munsiff's finding that the plaintiff's disability ceased on the 6th October 1887.

It is not contended that the plaintiff's guardian acted for the plaintiff in the matter of transferring

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the land to defendant No. 1. If the land had remained with him without passing on to defendant No. 2, there would have been no difficulty at all in deciding that the transfer was void *ab initio*, having been alleged to have been made by a minor, and that the suit was within time as it was for the recovery of land and was laid within twelve years from 1882 when the alleged transfer took place. I am surprised that the Munsiff found the transfer by a minor to be binding simply because the minor did not pay the *kandayem*. The relief given by the Limitation Act on account of the legal disability of minority would have been of no practical use in this case as the suit was laid within twelve years from the date of dispossession of the property. There is no evidence at all that any razinama was given even by the minor. The original transfer papers are not forthcoming and the Munsiff was satisfied with a substitute which was never presented to any revenue officer. Even the entry altering the names is in the handwriting of the Shanbogue himself without the authority of any superior officer, and I have no hesitation in holding that the whole allegation about this transfer is false.

But the real stumbling-block to the plaintiff is the fact of the sale of this land for arrears of Government revenue. I cannot see how the plaintiff can get back his land unless and until this sale is set aside. It cannot be said that the sale is void *ab initio* and that therefore it does not affect the plaintiff at all. Even if the sale is tainted with fraud I conceive that till it is alleged and proved and the sale is set aside on the ground of fraud, the sale

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must be considered as valid and binding. Being a revenue sale no one's interest alone in the land was conveyed, but it extended to the whole occupancy right. So it seems to me that till the plaintiff succeeds in setting it aside he cannot recover the land. The Statute of Limitation is clearly against him. If no fraud is alleged, Article 12 of Schedule II of the Limitation Act governs the case, and gives the plaintiff only one year from the date of the confirmation of sale. The legal disability under which the plaintiff was labouring extends the period for one year from his attaining majority and the date of this event is, as already found, 6th October 1887. The suit which ought to have been filed within one year from that day or before the 6th October, 1888 was not filed till October 1891 and is for this reason clearly barred.

Assuming that the plaintiff has filed this suit for relief on account of fraud the Article applicable is No. 95, which gives a period of three years from the date on which the plaintiff became aware of the fraud. The plaintiff has not alleged how and when he discovered this fraud. Nor am I disposed to hold that there has been any fraud in connection with the revenue sale. Ex. *A* is a petition by defendant No. 2 asking for remission and it is said to be in the handwriting of defendant No. 1. This fact alone does not establish any fraud. The defendants admit they are related to one another and that a portion of the holding is in the enjoyment of defendant No. 1. I cannot see any fraud in this circumstance either. This contention must therefore fail. Even under this clause three years from the confirmation of sale, which was about

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the 3rd October 1887, expired long before this suit was filed in February 1891.

For these reasons I hold that the plaintiff's suit is barred and has been rightly dismissed.

I would dismiss this appeal with costs.

THUMBOO CHETTY, C. J.—There is not a tittle of evidence to support the plaintiff's allegation of fraud in connection with the sale of the suit-land for arrears of revenue. The sale took place on the 28th July 1887. The plaintiff, according to his own admission, attained majority on the 7th October 1887 and became aware of the sale in September 1889. This suit, which was filed on the 2nd March 1891, was virtually a suit to set aside the revenue sale, and the period of limitation, prescribed by Art. 12 Schedule II of the Limitation Act, is one year from the time the sale is confirmed. The sale appears to have been confirmed in October 1887. The plaintiff had a right to institute this suit within a year from October 1887, and there is nothing to show that he has, by means of fraud practised by the defendants, been kept in ignorance of the revenue sale. He could not therefore claim the benefit of the provisions of section 18 of the Limitation Act. Article 95 does not at all apply to this case. The plaintiff was bound to bring this suit within a year after he attained majority, and he did not do so. Even granting that he became aware of the sale in September 1889, the one year allowed by Article 12 expired on September 1890 and the suit was not brought till March 1891. The suit is clearly barred by limitation. I therefore agree to this appeal being dismissed with costs.

Appeal dismissed with costs.

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Before A. Ramachendra Iyer and P. N. Krisfna Murti, Judges.

1892 May 30.

PADMAIYA (PLAINTIFF) *v.* SUBBARAYA AND NARASIMHA, MINORS, BY THEIR GUARDIAN KODAMMA, AND CHICKA NARASA (DEFENDANTS).*

Minors—Code of Civil Procedure (XIV of 1882), Chap. XXXI —Omnia præsumuntur rite esse acta—Proof against heirs of deceased.

The appointment of a next friend or a guardian to a minor under Chapter XXXI of the Code of Civil Procedure should not be regarded as merely a *pro formâ* proceeding. The Court should make a complete enquiry and ascertain that the person to be appointed has no interest adverse to the minor and is a proper person fitted in every way to guard and protect that minor's interests. Although it does not appear on the record that such enquiry was held, yet it must be presumed that the requirements of the law have been duly complied with.

Applying the rule of the Privy Council in *Lashi Parshad* v. *Maharaja Narendro Kishore Singh Bahadoor* (1) that "in an action brought to recover money against the heir of a deceased person it has always been necessary to establish as reasonably a clear case as the facts will admit of" the Court *held* the plaintiff had failed to prove his case and his suit should be dismissed.

The suit was one for enforcement of a mortgage given in 1890 by one Kandappa over property which the plaintiff affirmed had come into the possession of the defendants, Nos. 1 and 2 as Kandappa's illegitimate sons and successors and No. 3 as tenant. Up to the issues defendant No. 3, the maternal uncle of the minors, appeared on the record as their guardian. He then refused to act and one Kodamma was appointed. Nothing appeared on the record to shew who Kodamma was or what claim she had to act for the minors nor did it appear that any enquiry had been held as required by the Code of Civil Procedure, nor

* Appeal No. 222 of 1891 against original decree No. 90 of 1891 of Mr. A. Ananda Rao, Munsiff of Nelamangala, dated the 21st day of July 1891.

(1) L. R. 19 I. A., 9.

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even an affidavit filed with the application for her appointment.

The defence was that defendants Nos. 1 and 2 were not sons of Kandappa; that the property was not mortgaged by him; that it did not belong to him but to defendants Nos. 1 and 2; and that defendant No. 3 was a permanent lessee of the land under *aragandaya* tenure.

No evidence whatever was adduced by the minors' guardian; but the Munsiff on close analysis of the plaintiff's evidence pronounced it unsatisfactory and declined to believe it. He dismissed the suit with costs.

The plaintiff appealed to the Chief Court.

Mr. *S. Nanjappa* for the appellant.

Mr. *S. Narayana Rao* for the respondent.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISTNA MURTI, JJ.) was as follows:—

The plaintiff in this case sued the defendants for the recovery of Rs. 59, being principal and interest due on a hypothecation bond executed by one Kandappa.

The plaintiff alleged that defendants No. 1 and No. 2 were the illegitimate sons of the said Kandappa, having his property in their enjoyment. Defendant No. 3 was said to be cultivating the land hypothecated and was sued in his own right as being in possession of the land as also as the guardian of the other defendants who were minors. He refused to act as guardian and on the plaintiff's application one Kodamma was appointed guardian. There is no information in the record as to who this Kodamma is and what interest she has in the minors. The

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appointment of a next friend or a guardian to a minor under chapter XXXI of the Code of Civil Procedure should not be regarded as merely a *pro formâ* proceeding. The court should make a complete enquiry and ascertain that the person to be appointed as guardian has no interest adverse to the minor and that he is a proper person fitted in every way to guard and protect his interests. Section 456 requires that an affidavit should be filed with an application in this behalf. The Munsiff does not mention any facts bearing on the point in his order appointing Kodamma as guardian and we have only to presume under the circumstances that the requirements of the law have been duly compiled with and that the interests of the minors have been sufficiently considered by the Munsiff. It is however strange that no evidence was adduced by the defendants' guardian to prove the pleas raised in the case that the defendants were not the sons of Kandappa and that the land hypothecated was not his, but in the view we have taken of the evidence adduced by the plaintiff we deem it unnecessary to make any directions in this respect.

The Munsiff has in our opinion correctly appreciated the evidence on record and we uphold his finding that the genuineness of the debt has not been proved. In a very recent case, their Lordships of the Judicial Committee of the Privy Council made the following pertinent remarks :—

"In an action brought to recover money against the heir of a deceased person, it has always been considered necessary to establish as reasonably a clear case as the facts will admit of, to guard against

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the danger of false claims being brought against a person who is dead and thus is not able to come forward and give an account for himself." *Lashi Parshad v. Maharaja Narendro Kishore Singh Bahadoor*(1).

Applying this wise dictum to this case we have no hesitation in holding that the plaintiff has signally failed to prove his case. The analysis of evidence presented by the Munsiff in his judgment is correct. He has shown that the witnesses have contradicted themselves in describing the purpose of the loan, in stating the kinds of coin which were exchanged, in giving the order in which the witnesses came and in short in all the important details. The Munsiff has in para. 27 of his judgment given cogent reasons for not believing witness Krishna Sastri.

On the whole we are of opinion that the evidence offered by the plaintiff is not such as should be relied upon in a case against minors and we confirm the decree of the Munsiff. Plaintiff will bear the costs of the suit in both the courts.

Appeal dismissed with costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

B. RAMACHENDRA CHARRY (PLAINTIFF) v. MADHVA RAO AND OTHERS (DEFENDANTS).*

1892 June 3.

Damages—Costs of Criminal Prosecution—Trespass—Measure of damages—Evidence of quantum of loss.

Held that, as ruled in *Anniammah* v. *Nanje Gowdah*(2), the costs incurred in a criminal prosecution cannot be recovered as damages in a civil suit. The measure of damages in a case of trespass is

* Appeal No. 384 against original decree No. 48 of 1891 of Mr. B. Basavaradhya, Munsiff of Chickballapur, dated the 18th day of November 1891.

(1) L. R. 19 I. A., 9. (2) 8 M. L. R., 171.

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the actual loss a man is put to, and the cost of a criminal prosecution does not fall within its legitimate scope.

[See also *Mahomed Ali* v. *Bayama* (1) and *Fazul Imam* v. *Fazul Rasul* (2)].

Held also that, the evidence of the plaintiff being vague and discrepant, there is no precise information as to the number and value of his trees cut. The damages cannot be properly assessed owing to the plaintiff's failure to furnish evidence to prove the exact quantity of his loss.

The suit was brought to recover the value of 80 aloe trees wrongfully cut and removed from the plaintiff's land and for the costs of prosecuting defendants 2, 3 and 4 in the Magistrate's Court for so doing.

The plaintiff stated that the trees were cut and removed from his land by defendants 2, 3 and 4 and that upon his prosecuting them in the Magistrate's Court for theft, defendant No. 1 appeared as a witness for them and deposed that the trees cut down by them belonged to him and were cut and removed by his order; whereupon the defendants were discharged on the ground that the case was of a civil nature.

The plaintiff therefore sued all the defendants to recover the value of the trees and his criminal court costs, including those of applying on revision to the Chief Court.

Defendant No. 1 denied that he caused any trees on the plaintiff's land to be cut, but asserted that he got the other defendants to cut aloe trees upon his own land; and denied the valuation assessed by the plaintiff as well as his right to costs of the prosecution. The other defendants practically raised the same defence.

(1) I. L. R. 14 Bom., 100. (2) I. L. R. 12 All., 166.

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The Munsiff held that the costs of the criminal prosecution could not be recovered as they were too remote damages: and as to the plaintiff's evidence generally found it very unsatisfactory and unworthy of belief. He therefore dismissed the plaintiff's claim.

The plaintiff appealed to the Chief Court.

Mr. *Krishna Murti* for the appellant.

Mr. *B. Nunjundappa* for the respondents.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows:—

The ground of this action as laid in the Court of the Munsiff of Chickballapur was said to be the wrongful act of the defendants in trespassing on to the plaintiff's land and cutting and removing from there some aloe trees. Fifteen rupees were claimed as the value of the trees and forty rupees as the costs incurred in carrying on a criminal prosecution against the defendants.

The Munsiff disbelieved the evidence and dismissed the suit.

The plaintiff has filed this appeal.

Regarding the damages claimed for the costs incurred in the criminal prosecution, *Anniammah* v. *Nunje Gowdah*(1) is an authority for holding that the plaintiff is not entitled to recover. When a civil wrong is also a criminal offence, the party aggrieved is at liberty to institute a public prosecution or a private suit. Neither of these remedies excludes the other nor is there any thing to bind the party to the one course as a necessary preliminary condition to the other. A public prosecution has for its object the punishment of the offender, while a private action

(1) 8 M. L. R., 171.

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is instituted to obtain private satisfaction. The wrong-doer is not responsible for the expenditure which a party may of his own free-will incur in instituting voluntarily a public prosecution and such expenditure cannot be said to be a direct consequence of the wrong complained of. The measure of damages in a case of trespass is the actual loss a man is put to, and the cost of a public prosecution does not fall within its legitimate scope. We disallow the claim for forty rupees.

With regard to the other sum of fifteen rupees claimed by the plaintiff, we find there is absolutely no evidence that defendant No. 1 directed the other defendants to cut any of the plaintiff's trees. No enquiry was made of him by the plaintiff before the latter rushed into a court of justice, and the plaintiff's witnesses have themselves stated that this defendant did not own the acts of the other defendants and had no objection to the plaintiff taking away any there were of his trees. The evidence for the plaintiff is vague and discrepant. There is no precise information regarding the number of trees cut and their value. Even supposing that the defendants did by a mistake cut any of the plaintiff's trees, the damages cannot be properly assessed owing to the failure of the plaintiff to furnish evidence to prove the exact quantity of his loss. The evidence to prove the cutting and removing also is discrepant and unsatisfactory.

On the whole we agree with the Munsiff that the plaintiff has not established his case. We confirm his decree and dismiss this appeal with costs.

Appeal dismissed with costs.

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Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

THIMMAKKA (DEFENDANT) *v.* EARIAH AND OTHERS (PLAINTIFFS).*

1892 *June* 11.

Hindu Law—Maintenance—Suit for possession of land—Res Judicata.

Held, the doctrine that a woman has a right to be maintained by her father's family if her husband's family is not in a position to maintain her, is not applicable to the present case, for it does not appear whether or no her husband's family is able to maintain the defendant. Her right of maintenance ought to be decided in a separate suit; it is no bar to the present suit which is brought by the plaintiffs to obtain possession.

The Munsiff gave the plaintiffs a decree with costs, against which the defendant appealed to the Chief Court.

Mr. *S. Narasimha Iyengar* for the appellant.

Mr. *L. Srinivasiengar* for the respondents.

The facts are sufficiently set out in the judgment of the Chief Court (THUMBOO CHETTY, C.J. and RAMACHENDRA IYER, J.) which was as follows :—

This was a suit for possession of land which was the property of Veerabhadria, deceased. The plaintiffs alleged they were his divided cousins, and, Veerabhadria's widow having died about three years ago, they were entitled to inherit his property.

The suit was resisted by the deceased's sister. She alleged she was in possession of the property for about 18 years and was entitled to hold it during her life-time.

The Munsiff of Tumkur decreed the plaintiffs' claim. The defendant has appealed.

The defendant's case was that Veerabhadria's

*Appeal No. 230 of 1891 against original decree No. 722 of 1890 of Mr. Vardarajaiengar, Munsiff of Tumkur, dated the 2nd day of June 1891.

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widow never enjoyed the property, and that she and her mother enjoyed it after Veerabhadria's death. The plaintiffs' case was that Veerabhadria's widow was alive till about three years ago, she enjoyed the land and lived partly with the defendant and partly with them. We are not prepared to hold upon this meagre and conflicting evidence either that Veerabhadria's widow had no possession at all, or that the defendant's possession was adverse to her for more than twelve years. The legal effect of adverse possession upon the claim of the plaintiffs as reversioners need not be considered, there being no evidence of the alleged adverse possession.

It was pressed upon us that the defendant was entitled to hold the property in order that she might maintain herself, and section 408 of Mayne's Hindu Law was quoted, wherein it is laid down that a woman has a right to be maintained by her father's family, if her husband's family is not in a position to maintain her. We express no opinion on the principle of law laid down in the section quoted above. It is not applicable to this case, for we do not know whether the husband's family is or is not able to maintain the defendant. Whether she has a right to claim maintenance from her brother's property and what provision ought to be made for her maintenance are questions which ought to be decided in a separate suit if she is advised to bring one. Even if she has a right to be maintained, it is sufficient to observe that the alleged right is no bar to the plaintiffs obtaining possession. We confirm the Munsiff's decree and dismiss the appeal with costs.

Appeal dismissed with costs.

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Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

HONNIAH AND ANOTHER (PLAINTIFFS) *v.* CHICKANNA AND OTHERS (DEFENDANTS).*

1892 *June 22.*

Execution sale—Code of Civil Procedure (Act XIV of 1882), s. 312 —Irregularity—Suit to set aside sale.

The suit was to set aside an execution sale on the ground of the sale notice not having been duly published. The plaintiffs were the judgment-debtors. Defendant No. 2 was the judgment-creditor; defendant No. 3 was the purchaser.

Held, that the Code of Civil Procedure *s.* 312 bars a regular suit, after confirmation, to set aside an execution sale on the ground of irregularity in publishing or conducting it.

Held further that the mere omission to beat the drum and to proclaim the sale by tom-tom is not such irregularity as can be urged as a ground for setting aside the sale. The plaintiffs being proved to have been aware of the date of sale could have advised intending purchasers: and there was neither fraud nor want of notice.

The maternal grandfather, Baselly, of defendant No. 2 obtained a decree against defendant No. 1 and the plaintiffs in O. S. No. 163 of 1885 of the Munsiff's Court: in execution, four gardens, which were held liable to the decree, were sold, and the sale was confirmed in regular course. Of the gardens, No. 4 belonged to plaintiff No. 1, while Nos. 2 and 3 belonged to plaintiff No. 2 and garden No. 1 to defendant No. 1. Both the plaintiffs were jointly interested in the cancelment of the sale. They alleged fraud in its publication and want of due notice to them.

The Munsiff held the plaintiffs had failed to prove any fraud on the part of the decree-holder or the purchaser at the court-sale; and that as they had had actual notice of the date fixed for the sale, their

*Appeal No. 241 of 1891 against original decree No. 73 of 1891 of Mr. S. Vardarajaiengar, Munsiff of Tumkur, dated the 2nd day of July 1891.

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assertion of ignorance as to when it was to take place, was untenable. He also held that, the questions being such as arose between the parties and related to execution, the suit of the plaintiffs was barred by s. 244 of the Code of Civil Procedure.

The following authorities were referred to on behalf of defendant No. 3 in the Munsiff's Court, but held by him not to be in point—

Viraraghava Ayyangar v. *Venkatacharyar*(1); *Basti Ram* v. *Fatu*(2); *Ram Gopal* v. *Khiali Ram*(3).

The Munsiff dismissed the suit with costs.

The plaintiffs appealed to the Chief Court.

Mr. *J. Evers* for the appellants.

Mr. *L. Srinivasiengar* for the respondents.

The judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows :—

We are clearly of opinion that the present suit is not maintainable.

In execution of a decree which defendant No. 2 obtained against the plaintiffs certain gardens were sold, and defendant No. 3 became the purchaser. The sale took place on the 17th February and was confirmed on the 27th May 1890. In the following month there was an appeal to this court against the order confirming the sale, on the ground that the sale was illegal as it was held on a close holiday. The appeal was dismissed on the 8th October 1890. On the 2nd February 1891 the present suit was instituted to set aside the sale, on the grounds that the sale-notice was not duly published, that the plaintiffs

(1) I. L. R. 5 Mad., 217.
(2) I. L. R. 8 All., 146. (3) I. L. R. 6 All., 448.

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had no notice of the sale and that there was, therefore, fraud and irregularity which vitiated the sale.

The confirmation of a sale under the Code of Civil Procedure binds the parties to the suit and, under the proviso to section 312, no regular suit lies to set aside such a sale on the ground of irregularity in publishing or conducting the sale. Neither the want of notice nor any such irregularity as that now alleged in the plaint was set forth in the appeal petition (Misc. A. No. 19 of 1890) presented to this court in June 1890. The order of the Munsiff, dated the 7th January 1890, passed in Execution Case No. 557 of 1889, shows that the plaintiffs were aware of the date fixed for sale. The date is specified in the order itself. There was no alteration in the date. It was clearly stated that the sale would take place in the court-house and notices of sale were duly affixed to the court-house and to the *chavadi* of the village in which the gardens were situate. The sale took place in accordance with the notices duly published. The mere omission to beat the drum and to proclaim the sale by tom-tom was not such an irregularity as could be urged as a ground for setting aside the sale. When the plaintiffs were aware of the date of sale there was nothing to prevent their inducing their villagers and friends to attend the sale. There was neither fraud nor want of notice. As the plaint does not set forth any other cause than that the sale has been irregularly conducted, this suit to set aside the sale is not sustainable. We affirm the Munsiff's decree and dismiss this appeal with costs.

Appeal dismissed with costs.

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Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1892 Nov. 7.

RAMANNA AND OTHERS (PLAINTIFFS) *v.* SOORANARANAPPA AND ANOTHER (DEFENDANTS).*

Possessory Mortgage—Liability of mortgagee to take care of the mortgaged property—Onus of proof—Sub-mortgagee—His liability—Damages how estimated—Principles to be followed in absence of definite enactment.

Held that a mortgagee in possession is bound to take as much care of the property as a prudent owner would: and it is generally immaterial whether any negligence that may cause loss is imputable to him or his assignee; but on the facts found by the Munsiff, the person in the present case liable to the plaintiffs for damages is defendant No. 2.

Held further that the amount of damages in the case is to be estimated by the value of the old house and not by the sum it would cost to build a new one.

Per RAMACHENDRA IYER, J.—There being no Regulation in force in Mysore defining the rights and obligations of a mortgagor and mortgagee, principles to decide a case thereon must be sought elsewhere. The law applicable to a bailee may be applied to a mortgagee in possession. On reference to the laws of British India, England, America and Rome, a duty somewhat similar is thrown on the mortgagee. A rule which is to be found in the laws of so many countries must rest upon some strong and clear reason which necessarily led lawyers in distant countries and different ages to the same conclusion; and may be adopted by the Chief Court of Mysore without hesitation. The destruction of the property is *primâ facie* evidence of want of diligence. The onus lies on the mortgagee of proving that he took as much care as he was bound to take and that it was not owing to his want of due care and diligence that the house was destroyed.

Per THUMBOO CHETTY, C. J.—A mortgagee in possession holds the estate strictly as a trustee. He may not be liable for want of extreme precautions, but he would be liable if it be shown that he omitted to take that care which every man of common prudence with ordinary caution is expected to take of his own property.

The plaintiffs, minors, sued to redeem a possessory

* Appeal No. 380 of 1891 against original decree No. 163 of 1891 of Mr. S. Vardarajaiengar, Munsiff of Tumkur, dated the 29th day of September 1891.

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mortgage of a house in Tumkur, executed by their father on the 30th December 1862 for Rs. 125 in favour of defendant No. 1, and by defendant No. 1 assigned on the 25th March 1876 to defendant No. 2; also to recover Rs. 500 as damages incurred in consequence of the house having fallen down and become worthless some eighteen months before suit by reason of the neglect of the defendants, in whose possession it was, to take due care of it and to repair it when required.

The mortgage-deed provided that the mortgagee might occupy the house until the repayment of the mortgage-money and that the mortgagor would also pay such moneys as might be spent by the mortgagee in repairing dilapidations.

The original mortgagee left Tumkur and handed over the mortgage and house to defendant No. 2, who claimed from his co-defendant on a balance of account after allowing for what was due on the assignment and for alleged repairs. Defendant No. 2 in his turn handed the house over to one Nunjappa and left Tumkur. Each defendant threw the blame upon the other and tried to shift the responsibility for the damages.

The Munsiff held that the mortgage-deed did not make it imperative on the mortgagee to do repairs: it only bound the mortgagor to pay for whatever the mortgagee might choose to execute: and that the mortgagee was not bound by law to keep the house in the same condition as it was when handed over to him. He therefore dismissed the claim for damages: and decreed redemption upon the plaintiffs

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paying within three months the full amount of mortgage-money (Rs. 125) of which he allotted Rs. 68 to defendant No. 2 and the balance to defendant No. 1.

The plaintiffs appealed to the Chief Court.

Mr. *K. T. Narasimiengar* for the appellants.

Mr. *Jeyaramier* for respondent No. 1.

Mr. *S. Nanjappa* for respondent No. 2.

On the 27th June 1892 the Chief Court, being of opinion that the case should be remanded to the lower court for the trial of additional issues, passed the following preliminary judgments:—

RAMACHENDRA IYER, J.—This is a suit for redemption of mortgage on a house. The mortgagee, who had possession, having allowed the house to go to ruin, the plaintiffs claimed damages.

Defendant No. 1 was the original mortgagee and defendant No. 2 got it from him on sub-mortgage. Defendant No. 1 pleaded that the house was in good condition when he put defendant No. 2 in possession and that the latter was liable in damages. The sub-mortgagee's defence was that the original mortgagee alone was liable.

The Munsiff of Tumkur disallowed the claim. The plaintiffs have appealed from the decree.

The judgment of the Munsiff on this point was as follows:—"Since the defendants are not bound to preserve the house in good repair, they are not liable to pay any damages to the plaintiffs. The plaintiffs or their father ought to have redeemed the house before it fell down."

I am of opinion that the Munsiff has not taken a correct view of the obligations of a mortgagee.

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I do not think that the mortgage-bond obliged the mortgagee to keep the house in repair. The agreement that if the mortgagee executed repairs he would be paid for it by the mortgagor, was made for the benefit of the mortgagee, so that he might not lose the money which he might spend upon the house. As there was no agreement between the parties imposing a duty upon the mortgagee, we have to determine whether the defendant was legally bound to preserve the house from ruin.

There being no Regulation in force which defines the rights and obligations of a mortgagor and mortgagee, we are under the necessity of seeking elsewhere for the principles by which to decide the case now before us. I think that the law which is applicable to a bailee may be applied to a mortgagee in possession. The obligations of a bailee are defined in sections 151 and 152 of the Contract Act which are as follows:—"In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed." "The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151." If a bailee is bound to take as much care of the thing bailed as a man of average prudence would take care of it if it was his own, it may not be unreasonably contended that a mortgagee in possession is under an obligation to take reasonable care of the security and to preserve it from destruction.

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The laws of other countries, however, afford authorities more precisely applying to the circumstances of the case. The law in force in British India is contained in section 76 of the Transfer of Property Act—"When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must manage the property as a person of ordinary prudence would manage it if it were his own."

The English law on the subject is slightly different. A mortgagee is held responsible for gross or wilful negligence only. (Coote on Mortgages, 5th ed. p. 810). This rule seems to be in accordance with the English law of bailments, under which the degree of diligence, which a bailee is bound to exercise, varies according as the bailment is for the benefit of the bailor or of the bailee or of both. This distinction being swept away by section 151 of the Contract Act, the rule that gross negligence alone will make a mortgagee liable in damages may not apply to the case before us.

The diligence, which is required of a mortgagee under the American law, seems to be the same as that which is required in British India. "By taking possession, he imposes upon himself the duty of a provident owner." (Kent's Commentaries, Vol. 4, p. 166).

The burden which was cast upon a mortgagee by the law of Rome, appears to have been more onerous. I take the law as I find it in Hunter's Roman Law, 1st ed., p. 267. "Since a pledge is given for the good of both parties, for the debtor's good, because the money is more readily lent him; for the creditor's because the money he lends is in greater

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security, it is held to be enough that the creditor in guarding the property should use *all possible diligence.* If he does this, and yet by some chance mishap loses the property, he is not answerable; nor is he hindered from claiming the money lent." *See* also Domat's Civil Law, vol. I, p. 677, ss. 1725 and 1726.

A rule which is to be found in the laws of so many countries must rest upon some strong and clear reason which necessarily led lawyers in distant countries and different ages to the same conclusion; and this rule may be adopted by us without hesitation. The rule being that a mortgagee who takes possession engages with the mortgagor to take as much care of the property as a prudent owner would, the destruction of the property is *primâ facie* evidence of want of diligence. The onus lies upon him of proving that he took as much care as he was bound to take and that it was not owing to want of due care and diligence that the house was destroyed.

The sub-mortgagee, who claims under a contract made with the mortgagee and who was no party to the contract in suit, is not *primâ facie* answerable in damages. His possession was not inconsistent with that of the mortgagee so far as the plaintiff was concerned, and damages, if any, must be paid by the mortgagee alone. If, however, there are special circumstances to fix the liability upon the sub-mortgagee, they must be specially alleged and proved.

The Munsiff having taken a wrong view of the law, the investigation has been defective. It is necessary to have his finding upon the following issues:—

(1). Did the mortgagee take that care of the house which a prudent owner would have taken?

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(2). If the finding is adverse to the defendant, what is the amount of damages to which the plaintiff is entitled?

(3). Is the sub-mortgagee liable, and if yes, to what amount?

The parties are at liberty to adduce fresh evidence, and the Munsiff is directed to submit it together with his findings within six weeks.

THUMBOO CHETTY, C. J.—The mortgage was with possession and the mortgagor bound himself to repay to the mortgagee the monies spent by the mortgagee in repairing the dilapidated portions of the building mortgaged. In the deed of assignment also, there is a stipulation imposing on the assignee the obligation of keeping the building in repair. It is thus evident that the mortgagee in possession was bound to keep the mortgaged property in repair and that he was entitled to charge the mortgagor for the necessary expenditure incurred in repairs and ordinary improvements. In the plaint, it was alleged that the defendants neglected the property, and in consequence it fell down. It was necessary, therefore, to enquire and determine whether there was such negligence as entitled the plaintiff to claim damages. A mortgagee in possession holds the estate strictly as a trustee. He may not be liable for want of extreme precautions, but he would be liable if it be shown that he omitted to take that care which every man of common prudence with ordinary caution is expected to take of his own property. It is immaterial whether the negligence is imputable to the mortgagee or his assignee. I, therefore, agree to the order proposed by my colleague.

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The Munsiff having returned his findings on the additional issues referred to him, the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) passed the following final judgment:—

The additional evidence taken by the Munsiff, in pursuance of the orders of this Court, dated 27th June last, supports the finding of the Munsiff, that, when the suit-house passed to the possession of defendant No. 2 under the deed of assignment (Ex. *III*) in 1876, it was in good condition. Just a year before defendant No. 2 got possession, the house was valued by punchayetdars, for purposes of Municipal taxation, at Rs. 150 (Ex. *V*). Defendant No. 2 occupied the house till March 1891 and afterwards left it in charge of one Nunjappa. Subsequently, portions of the house gradually came down apparently for want of repairs, and, after Nunjappa left the house three years ago, there was no one to look after the house. It was completely neglected and the whole roof fell down. Thus it will be seen that it was after defendant No. 2 became the sub-mortgagee proper care was not taken, and, for three years subsequent to Nunjappa leaving the house, it was unoccupied and there was no one to take care of it. So far back as the year 1879 or 1880, defendant No. 1 remitted Rs. 20 to defendant No. 2, to enable the latter to sue the plaintiffs for recovery of the mortgage amount. Defendant No. 2, without taking steps forthwith to compel the plaintiffs to redeem the house, remained quiet; and it was the negligence and want of care of defendant No. 2 that led to the dilapidation of the suit-house. Under these circumstances, the person who is liable to the plaintiffs for damages is

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defendant No. 2. The whole injury to the house arose subsequent to the assignment of the mortgage to defendant No. 2. The value of the premises at the time of assignment has been fixed at Rs. 150, and, some fourteen years before that, when the original mortgage to defendant No. 1 took place, it may have been worth about Rs. 200; but not so much as Rs. 500 as alleged by the plaintiffs, for the present estimate by the Executive Engineer (for restoration of the house) when the rates of labor and cost of materials are considerably higher, is only Rs. 346. We may therefore safely put down the approximate value of the house at the time it was mortgaged to defendant No. 1 at Rs. 200, exclusive of the cost of levelling the ground. On account of wear and tear and general deterioration of the past thirty years, we may deduct 20 per cent. or Rs. 40 and fix the balance as the value prior to the dilapidation of the suit premises. The amount of damages in this case is to be estimated by the value of the old house and not by the sum it would cost to build a new one. *See* Mayne on Damages, 4th ed. p. 410. We accordingly fix the damages at Rs. 160, and, deducting from this, Rs. 125, the mortgage amount, the balance payable to the plaintiffs is Rs. 35, which sum defendant No. 2 will be adjudged to pay to the plaintiffs and restore the suit premises to them. Taking into consideration the length of time which has elapsed between the date of mortgage and the institution of this suit and the fact that the plaintiffs have succeeded in obtaining only Rs. 35 out of Rs. 400 claimed in the plaint as damages, we direct each party to bear their own costs throughout.

Appeal allowed in part. No costs.

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Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

MALLEGOWDA AND ANOTHER (DEFENDANTS) *v.* CHELUVIAH, (PLAINTIFF).* 1892 *July* 11.

Land Revenue Code, ss. 187, 221—Possession—Revenue sale, rights of purchaser at—Putta-huq—Mesne profits—Code of Civil Procedure (XIV of 1882), s. 212—Revival of mortgage liability.

The purchaser with possession at a revenue sale for arrears of revenue sued for a declaration of his right, for possession and for mesne profits. He was resisted chiefly on the ground that at the sale only a limited right (*putta-huq*) was disposed of and that he purchased no more than the right, title and interest of the then holder of such right. Defendant No. 2 also sought to set off an old mortgage debt on the score that it would revive, upon the land coming again into the ownership of the plaintiff.

Held that s. 221 (C) of the Land Revenue Code is no bar to the entertainment of the present suit by the civil court.

Held further, that it was the land itself that was sold and not simply the *putta-huq*, which is an unmeaning term. The full rights of the defaulter passed to the purchaser absolutely and no contention by the defendants to the contrary can be accepted.

The mortgage rights set up by defendant No. 2 were determined by his omission to pay up the arrears and prevent the sale; he raised no contention as to revival in the lower court and it is not now tenable.

The question of mesne profits should be held over to the stage of execution under s. 212 of the Code of Civil Procedure.

Per THUMBOO CHETTY, C. J.—The use of the expression *putta-huq*, whether authorisedly or unauthorisedly, does not affect the actual rights possessed by the defaulter as between himself and the Government.

Semble.—The Mysore Land Revenue Code is no bar to the entertainment of a suit by a civil court under suitable circumstances, should complicated questions of title arise: as, for instance, should the revenue authorities give only symbolical possession and resort to a civil court be necessary to obtain actual possession.

Timmarasia v. *Subba Bhatta*(1) approved.

* Appeal No. 210 of 1891 against original decree No. 130 of 1889 of Mr. A. Ananda Rao, Munsiff of Nelamangala, dated the 13th day of May 1891.

(1) 7 M. L. R., 14.

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The suit was brought to establish the plaintiff's right over certain land, for recovery of possession and for mesne profits. The plaint stated that the land in suit belonged to one Karaneek Krishnappa and was sold by the revenue authorities for arrears of revenue on the 7th May 1886, when the plaintiff became purchaser and thereby puttadar and owner of the land, in respect of which he had been since paying *kundayem* to Government: that defendant No. 1 is the cultivating ryot who refuses to give up possession to the plaintiff or to pay him the usual *wara* produce. Defendant No. 2 was added by the court, as defendant No. 1 stated him to be the real owner of the land, who had for some years previously received the landlord's share of produce from defendant No. 1. The defendants denied that Karaneek Krishnappa was ever owner of the land: but alleged he held merely a qualified ownership termed *putta-huq*, which they asserted was sold at the revenue sale and nothing more. It was found by Ex. *Q* that the plaintiff had actually been put in possession of the land by the revenue authorities in pursuance of the sale.

The defendants appealed to the Chief Court.

Mr. *S. Narayana Rao* for the appellants.

Mr. *A. Sambasivia* and Mr. *S. Nanjappa* for the respondent.

The case was remanded by the Chief Court to the Munsiff for retrial and the plaintiff's claim was thereupon allowed, the Munsiff holding there was no reliable evidence that *putta-huq* only was sold; that the term *putta-huq* is one unknown to the revenue

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law in force at the time of sale or subsequently; and that it is opposed to the spirit of revenue sales which dispose of land absolutely, free and unencumbered.

Defendant No. 2 set up in the appeal, an old claim on a mortgage-debt due him by the plaintiff in respect of the land before its sale and which he urged should be held to have revived, in the event of the court declaring the plaintiff to have become again the owner of the land.

The following judgments were delivered by the Chief Court:—

KRISHNA MURTI, J.—On a careful perusal of the whole evidence in this case I am of opinion that the appellants are not entitled to succeed.

The case was more than once argued before me.

The plaintiff, who is purchaser of the land in suit (part of Survey No. 7 in the village of Malur) and has been put in possession of it by the Revenue authorities, has brought this suit to eject defendant No. 1, *varum* tenant of the previous occupant. Defendant No. 2 has been introduced into the record as being the real and rightful owner in possession of the land.

The case was first tried by Mr. Venkata Rao, Munsiff, and as his enquiry seemed defective the case was remanded on appeal to this Court. Mr. Ananda Rao, Munsiff, has taken great pains to collect and review all the available documents. He has written an elaborate judgment and the conclusions he has recorded are supported by good reasons and are correct. But in the absence of any material document to show that the purchaser was actually put in possession of the land he bought at the revenue sale, it

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appeared to me that this court had no jurisdiction to entertain the case under s. 221 (C) of the Land Revenue Code, under which no civil court shall exercise jurisdiction as to claims connected with or arising out of any proceedings for the realization of land-revenue.

If the plaintiff's claim to be put in possession of the land rested entirely on the right which he acquired at the revenue sale it would doubtless have been a claim arising out of proceedings for the realization of land-revenue and the proper forum for the purchaser to have resorted to would have been the Deputy Commissioner, who has power under section 187 of the Code to put such party in possession. But the additional papers which we called for and received contain among them the document which we have marked Ex. *Q* and which is the receipt obtained from Cheluviah for being put in possession of the land in dispute. In the presence of this evidence all the reasoning which the Munsiff has recorded at great length becomes superfluous. It was not simply the *putta-huq* which, as observed by the Munsiff, is an unmeaning word not found in the revenue vocabulary, that was sold, but it was the land itself in possession of which Cheluviah was put. It is not within the province of this court to enquire into the validity of a revenue sale; but as the starting point for us to proceed from, we have the fact that Cheluviah was put in possession of the land in dispute by the revenue authorities, as is evidenced by Ex. *Q*.

The question now narrows itself into one of great simplicity and that is, whether as against Cheluviah the defendants-appellants are entitled to remain in

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possession. The right which defendant No. 2 had before the date of sale is destroyed and the derivative title which defendant No. 1 pleads through him is also at an end. The plaintiff is the rightful owner entitled to the possession of the land and his suit to eject the defendants must prevail.

I do not see any objection to reserve the question of mesne profits to the stage of execution and the order which the Munsiff has made in this behalf may stand.

I cannot give any weight to the contention raised by Mr. Narayen Rao that the old mortgage liability which the plaintiff owed to defendant No. 2 before the land was once sold for the arrears of *kandayem* due by him revived as soon as the plaintiff again became the owner of it. This contention was not raised in the lower court and does not appear to me to be tenable.

For these reasons I would dismiss this appeal with costs and confirm the decree of the Munsiff.

THUMBOO CHETTY, C. J.—I also agree to the dismissal of this appeal with costs. The simple question which has to be decided in this case is, whether the plaintiff, as purchaser at the revenue sale, acquired full occupancy rights free of all incumbrances. The Government revenue being a paramount charge on the land, the purchaser at a sale held for default in the payment of assessment due to Government, acquiries full occupancy rights free from all claims. In this case it is clearly proved, as found by the Munsiff, that Krishnappa, the defaulter, was the registered puttadar at the time of sale, that the arrears were due on the land actually sold and what

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was or could have been sold under the revenue law and procedure in force at the time, was the occupancy right of the person whose name was registered in the revenue accounts and who was responsible to Government for the payment of the arrears. It is absurd, therefore, to contend, that only the right, title and interest of Krishnappa was sold. The use of the expression *putta-huq*, whether authorisedly or unauthorisedly, did not affect the actual rights possessed by the defaulter as between him and the Government.

The effect of a revenue sale has been repeatedly discussed by this court and the case quoted by the Munsiff, *Timmarasia* v. *Subba Bhatta*(1), is exactly in point. The full rights of occupancy which Krishnappa possessed passed to the plaintiff absolutely by the revenue sale, and the contention to the contrary made by the defendants cannot for a moment be accepted.

It seems to me that the mortgage rights set up by defendant No. 2 were determined, by his omission to pay up the arrears and prevent the sale.

Now, as to the question of jurisdiction referred to by my learned colleague, I am of opinion that s. 221 (C) of the Mysore Land Revenue Code is no bar to the entertainment of this suit by a Civil Court. Section 187 of the said Code no doubt provides that on confirmation of sale the purchaser shall be put in possession of the land sold. Whether the possession is to be actual or symbolical is not stated in the section. Supposing the purchaser is resisted, not by the defaulter but by third parties, and complicated

(1) 7 M. L. R., 14.

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questions of title have to be gone into and decided as between the purchaser and third parties, there must necessarily be an adjudication by a civil court; and I fail to see why the purchaser in such a case should not resort to the civil court to obtain possession. The question of jurisdiction was not raised by either party and the allegations made in the plaint and the pleas put forward by the defendants raise questions of title which could only be adjudicated upon and determined in a civil court and not by a Deputy Commissioner or Collector.

The plaintiff is clearly entitled to possession. The mesne profits due for the period claimed in the plaint will be ascertained in the course of execution and awarded to him under the Code of Civil Procedure, s. 212.

Appeal dismissed with costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 *July* 13.

CHICKA BYAMMA, (PLAINTIFF) v. NANJANNAH AND THREE OTHERS (DEFENDANTS).*

Registration of house in name of member of undivided family—Payment of assessment by family—Evidence of title—Specific Relief Act (I of 1877) s. 9—Possession—Hindu widow—Joint possession—Survivorship—Bhandu—Right to dwell in husband's family-house—To resist ejectment—To eject trespassers—Right of purchaser.

Held, that the registration of a house in the name of a member of a Hindu family and payment of assessment by that family are *primâ facie* evidence of the title of that family to the house; and, in the absence of rebutting evidence and of evidence that it was the self-acquired property of any particular member, it must be held to belong to the family.

Held also that, although the possessors of property may have no

*Appeal No. 295 of 1891 against original decree No. 812 of 1890 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 18th day of July 1891.

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right to it, they are entitled, except in a suit under the Specific Relief Act s. 9, to hold possession until ousted by the legal owner and to put claimants to proof of their title.

Held also, that a Hindu widow cannot claim title to her late husband's family-house either on the ground of joint possession and survivorship or on the ground of being a Bhandu. *Jogdamba Koer* v. *Secretary of State for India*(1) followed.

Held further, that a Hindu widow's right to dwell in her husband's family-house is not an imperfect and inchoate right, but a substantial legal right: so long as her right to maintenance and residence is not determined by a decree or by a private arrangement made with their consent, she cannot be ousted from the family-house by her husband's heirs or by purchasers from them: and a purchaser's title is subject to a widow's right to reside in the family-house. *Talemand Singh* v. *Rukmina*(2); *Dalsukhram Mahasukhram and others* v. *Lallubhai Moti Chand*(3) *Ramanadan* v. *Rangammal*(4) approved.

Held further that, such being the right of a Hindu widow, it is sufficient to entitle her to eject from the family-house those who are mere trespassers. *Sundar* v. *Parbati*(5) approved as being in point.

This was a suit for ejectment or maintenance. The plaintiff alleged that the properties in suit were the self-acquisition of her late husband's father, after whose death they descended to her husband and to his brother: that she was, after her husband's death, maintained by his brother and, when he died, by his widow up to her death, some eighteen months before suit: that then, defendant No. 1, who is brother of the plaintiff's said sister-in-law, and defendant No. 2, who is defendant No. 1's brother-in-law, ejected the plaintiff from the family house and deprived her of possession. They also caused a fraudulent deed to be executed in favour of defendant No. 3, by defendant No. 1. The plaintiff prayed that her right to

(1) I. L. R. 16 Cal., 367.
(2) I. L. R. 3 All., 353. (3) I. L. R. 7 Bom., 282.
(4) I. L. R. 12 Mad., 260. (5) I. L. R. 12 All., 51.

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maintenance might be declared; that the properties named by her be declared to belong to her husband's family and be subject to such right of maintenance; that she be declared entitled to have and retain possession of them for such maintenance: and for further and other relief. Defendant No. 4 was added, as being a member of the family interested, but disclaimed all right and interest in the suit or property in question.

Defendant No. 1 claimed the property as his own ancestral estate and alleged that he sold it *bonâ fide* to defendant No. 3.

The Munsiff recorded that "the plaintiff's case is that her husband and her father-in-law were enjoying the lands in their own right although the pottahs and registers pointed to the ancestors of defendant No. 1 as proprietors." He held that the plaintiff had failed to prove any of the property to belong to her late husband's family, and accordingly dismissed her claim with costs.

The plaintiff appealed to the Chief Court.

Mr. *N. Chelviengar* for the appellant.

Mr. *S. Narasimha Iyengar* for respondent No. 1.

Mr. *B. Nunjundappa* for respondent No. 3.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows:—

The plaintiff is the widow of Dodda Byanna, who died about 25 years ago, leaving behind him an undivided younger brother named Chick Byanna. The latter died about eight years ago and his widow died two years ago. The plaintiff alleged that she

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was being maintained by her brother-in-law and sister-in-law in the family-house, and that, when the sister-in-law died, the defendants took wrongful possession of the property. She sued for possession.

The defendants pleaded that the property did not belong to the plaintiff's husband and his brother and that, if it belonged to them, the plaintiff had no right to sue for possession.

The Munsiff found that the property did not belong to the plaintiff's husband, and dismissed the suit with costs. The plaintiff has appealed from the decree.

The plaintiff has sued for possession of two houses in the town of Bangalore, and certain fields in the village of Kethmaranhully. The two houses were formerly numbered 17 and 18 and the numbers were recently changed to 16 and 17 respectively. The house which is now numbered 16 is registered in the name of Siday Nanjay Naik, and the other house in the name of Yellampally Byra, who was either the plaintiff's father-in-law, husband, or brother-in-law. This house appears to have been rebuilt about thirty years ago. There is a conflict of evidence on the point whether it was the defendant who built the house or the plaintiff's brother-in-law. The assessment appears to have been paid by the plaintiff's brother-in-law and after his death by his widow, and it does not appear to have been ever paid by defendant No. 1. He alleges that the plaintiff's brother-in-law and his widow paid the assessment at his request and on his behalf. But there is no evidence to corroborate the statement. The registry in the

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name of a member of the plaintiff's family and the payment of assessment by that family are *primâ facie* evidence of the title of that family to the house in question. The defendants having failed to adduce rebutting evidence, we must hold that the house which is now numbered 17 was the property of plaintiff's husband and his brother. We say that it belonged to the two brothers, for there is no evidence at all that this was the self-acquired property of the plaintiff's brother-in-law. The title of the plaintiff's family to the other house has not been established. There is no satisfactory evidence to prove the title of the plaintiff's family to the land in suit. The putta stands in the name of defendant No. 1's grandfather. The plaintiff's husband and brother-in-law appear to have cultivated a portion of the land. But we are unable to say whether they cultivated as mere tenants, or whether they had acquired a valid title to it.

As we have found that one of the houses in suit belonged to the plaintiff's family, the question arises whether she has a legal title to recover possession from the defendants. It is true that they have no right to it; but, as they have possession, and as this is not an action under section 9 of the Specific Relief Act, they are entitled to put the plaintiff to the proof of her title, and they may claim to retain possession until they are ousted by the legal owner.

The plaintiff contends that she was dwelling in her husband's family-house, that she was maintained by her brother-in-law and sister-in-law, and that as she and they were in joint possession, she, as the surviving member of the family, is entitled to claim pos-

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session. Another ground of her alleged title was, that although she is not mentioned in the Smritis as a Sapinda or Samanodaka, so as to entitle her to inherit her brother-in-law's property, yet she might claim as a Bhandu in the absence of Sapindas and Samanodakas, and that in this case there was no evidence that there was a Sapinda or Samanodaka whose title might be considered to be superior to hers. These two questions were discussed in a similar case before the Calcutta High Court and the learned judges held that a Hindu widow could not claim title either on the ground of joint possession and survivorship or on the ground of being a Bhandu. *Jogdamba Koer* v. *The Secretary of State for India*(1). They have cited numerous authorities in support of their conclusion, and we have not come across any Smriti, digest or reported judgment to the contrary. We think we may follow this judgment and find against the right alleged by the plaintiff on the two grounds which we have mentioned above.

The plaintiff did not say that she was receiving separate maintenance from her brother-in-law; and the defendants did not allege that the plaintiff's brother-in-law had made any provision for her maintenance. That being so, her allegation that she was being maintained in the family-house does not seem improbable. It may be that she did not live continuously with her brother-in-law, and that she lived partly with her father and partly with her brother-in-law. This fact does not affect her right, if she has otherwise a right to possession.

(1) I. L. R. 16 Cal., 367.

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We think that a Hindu widow's right to dwell in her husband's family-house is not an imperfect and inchoate right, but a substantial legal right. So long as her right to maintenance and residence is not determined by a decree or by a private arrangement made with her consent, she cannot be ousted from the family-house by her husband's heirs or by purchasers from them. It is only when a sale is made by the heir or heirs under such circumstances as to make it binding on all the members of the family, that her right is said to be determined by it and the purchaser is allowed to claim possession of a family-house by ousting a widow from it. Otherwise a purchaser's title is subject to a widow's right to reside in the family-house. *Talemand Singh* v. *Rukmina*(1); *Dalsukhram Mahasukhram and others* v. *Lallubhai Motichand*(2); *Ramanadan* v. *Rangammal*(3).

If, as we have reason to think, the widow lived off and on in the family-house as a member of the family entitled to live in it, and if a Hindu widow's right to live in the family-house is such a substantial right as to entitle her to resist an action of ejectment brought by her husband's heir or a purchaser from him, the point for determination is, whether the plaintiff's right is sufficient to entitle her to eject the defendants who are mere trespassers. We think it is sufficient. The following remarks made by the Judicial Committee of the Privy Council are pertinent to the point before us—" The fact of joint possession by the two widows of the estates which belonged to the testator appears to them to be suffi-

(1) I. L. R. 3 All., 353.

(2) I. L. R. 7 Bom., 282. (3) I. L. R. 12 Mad., 260.

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cient for disposing of this suit in their favor. Their possession was lawfully attained in this sense, that it was not procured by force or fraud, but peaceably. In these circumstances it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs who can plead a preferable title." *Sundar* v. *Parbati*(1).

In modification of the Munsiff's decree, we direct that the house No. 17 be delivered to the plaintiff by the defendants, and that each party do bear his or her costs throughout.

Appeal allowed in part. No costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

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Aug. 9.

VENKETRAMANOOJIAH AND ANOTHER (PLAINTIFFS) *v.* ALASINGRIAH AND OTHERS (DEFENDANTS).*

Arbitration—Contract for sale—Suit for purchase-money—Inconsistent pleas.

A dispute as to title of property was referred to arbitrators. No proper reference to arbitration was signed by the parties. The arbitrators decided that the property should be sold by the plaintiff to the defendant and on registration of a sale-deed the money should be paid. The defendant refused to accept this condition. The plaintiff sued for the land. The Munsiff held he could only sue for the purchase-money, as there was a completed contract of sale.

Held that, as there was no allegation that a *kattadaku* had been executed to the punchayetdars, their opinion or decision was not legally binding upon the parties. There was therefore no completed contract. The defendants deny the plaintiffs' title and yet contend that they should be compelled to sue for purchase-money of what they had no right to sell. Such inconsistent and mutually

* Appeal No. 338 of 1891 against original decree No. 123 of 1889 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 25th day of July 1891.

(1) I. L. R. 12 All., 51.

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destructive pleas should not be tolerated. The defendants must either admit a contract of sale and claim title under it or repudiate the alleged contract and stand upon the independent title they allege.

The Munsiff having dismissed the suit, the plaintiffs appealed to the Chief Court.

The facts of the case sufficiently appear in the judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) which was as follows:—

We regret that this suit, which was filed in the Munsiff's Court in 1889, has twice come before us on appeal, and that even now we are not in a position to pass a decree finally disposing of the questions in dispute.

The plaintiffs alleged that they were owners of the property, and that the defendants were in wrongful possession. Negotiations were opened for an amicable settlement between the parties and the punchayetdars decided that the plaintiffs should sell the land to the defendants for Rs. 25 and that the money should be paid after they executed a conveyance and got it duly registered. The defendants did not care to abide by this arrangement and would not deliver possession of the land. The plaintiffs sued for possession and for damages.

The defendants denied the plaintiffs' title and set up their own.

The Munsiff was of opinion that, upon the allegations made in the plaint, the claim for possession was unsustainable, and that the plaintiffs' remedy was only to sue for the price of the land. The reason of the decision was, that the plaintiffs having agreed to sell the land and to receive Rs. 25, there was a completed contract of sale, that the title to the land

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vested in the vendee, and that the purchase-money was all that the vendor was legally entitled to claim. He considered it unnecessary to record evidence in regard to the facts in dispute, and he dismissed the suit. The plaintiffs have appealed.

The Munsiff's decision might be upheld, if there was a completed contract of sale and if the title to the land was transferred to the defendants. Such a valid transfer was not alleged by either party. It would seem from the plaint, that negotiations for a sale were made and that certain peace-makers were of opinion that a sale was the best arrangement that could be made under the circumstances. As there was no allegation that a *kattadaka* had been executed to the punchayetdars, their opinion or decision was not legally binding upon the parties. They did not agree to abide by that opinion, and, so long as there was no agreement, it is not reasonable to contend that there was a completed contract. Again, it does not lie in the mouth of the defendants to deny the plaintiffs' title and to contend that they were bound to sue only for the purchase-money. Why should they be compelled to sue for money when the defendants persisted in stating they had no right to sell the land? Such inconsistent and mutually destructive pleas ought not to be tolerated and do not deserve notice. The defendants must either admit a contract of sale and claim title under it, or repudiate the alleged contract and stand upon the independent title alleged by them. If the suit for possession is dismissed on the ground stated by the Munsiff, and if it is afterwards found there was no contract of sale and a suit for money is unsustainable, what

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is the plaintiffs' remedy, if they are the legal owners of the property? 1892

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We reverse the Munsiff's decree and remand the suit for investigation and decision on the merits. The respondents will pay the costs of this appeal.

Appeal allowed with costs. Suit remanded.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

VENKATA KRISHNA SETTY (DEFENDANT No. 4) *v.* SYED AMIR ALI SAIB (PLAINTIFF)

AND

SYED AMIR ALI SAIB (PLAINTIFF) *v.* A. P. NARASIMIYA AND OTHERS (DEFENDANTS).*

1892 *August* 20.

Vendor's lien for unpaid purchase-money—Against subsequent purchaser—Waiver or abandonment of lien—Separate agreement—Transfer of Property Act not in force in Mysore—Courts of Mysore, Courts of Equity and Good Conscience—Limitation Act (XV of 1877) s. 14 and Sch. II, Art. 111.

For the balance unpaid of purchase-money of a coffee-estate, an agreement was given by the purchasers to the vendors that delivery of the crop should be given in liquidation at certain fixed rates.

Before liquidation of such balance, the purchasers resold the estate, and their vendees again sold it. In these transfers the balance unpaid of the original purchase-money was referred to as an encumbrance on the estate and it was expressly stipulated that the transferees were not to be entitled to the produce until such balance was cleared off.

The plaintiff had previously brought a suit against the defendants on the agreement, but it was dismissed on the ground that, being brought before the defendants had defaulted, it was premature.

Held that as the Transfer of Property Act has not been extended to Mysore, the courts of that Province must proceed according to Equity and Good Conscience, and hold that a vendor possesses an

* Appeals Nos. 57 and 67 of 1892 against original decree No. 32 of 1890 of Mr. C. Sreenivasiengar, District Judge of Mysore, dated the 20th day of November 1891.

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equitable lien for unpaid purchase-money against his vendees and sub-purchasers with notice.

In the present case, the question must be decided not on the construction of the agreement and original sale-deed alone but upon consideration of all the documents and the terms and conditions of the subsequent transfers, in order to see what was the intention and understanding between the original vendors and vendees and whether the lien was preserved or abandoned.

The express reservation of the lien and the transfer of the estate to sub-purchasers with the liability to pay the debts out of the income of the estate prove clearly the intention of the parties from the commencement.

There was no security taken in substitution for the lien nor was any bond or covenant taken from a third person. The intention of the original vendors is clear. They expected to get the produce of the estate on which they had their lien till the debt was liquidated. That was their intention and was also the understanding of the vendees and their assignees. It must therefore be *held* that the vendor had not lost his lien on the estate for any money that might be due for unpaid purchase-money under the agreement.

Nairn v. *Prowse*(1) *Mackreth* v. *Symmonds*(2) and the cases noted in Dart(3), Kent(4) and White and Tudor(5) distinguished and reviewed.

Held further that the parties and cause of action in the previous suit being the same as in the present one but the court having no jurisdiction to entertain it because it was premature, the case falls within the purview of the Limitation Act (XV of 1877) s. 14, and the plaintiff is entitled to exclude the period occupied in prosecuting the previous suit. The present suit is therefore within time under Sch. II Art. 111 of the Limitation Act.

The Chief Court, differing from the Court below as to the estimation of the amount due to the plaintiff, modified the decree in that respect, and also assessed costs in both courts on the sums allowed and disallowed respectively.

Semble—Under the Transfer of Property Act, s. 55 cl. 4 (*b*) the vendor has a charge on the land in the hands of the buyer only.

The plaintiff having sold a coffee-estate and in res-

(1) 6 Ves. 752. (2) 15 Ves. 329.
(3) Law of Vendors and Purchasers, ed. 1888, pp. 825—386.
(4) Commentaries, ed. 1889, Vol. IV., p. 152.
(5) Leading Cases in Equity, Vol. I., p. 355.

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pect of it a balance of purchase-money remaining unpaid, sued the purchasers and their transferees to enforce his lien for the amount.

It was contended in defence that he had abandoned his lien by an agreement under which the balance purchase-money was to be liquidated by delivery of produce at fixed rates and that further, more than three years having elapsed the suit was barred by Sch. II Art. 111 of the Limitation Act.

To the latter branch of the defence it was answered that a previous suit brought by the plaintiff against the defendants upon the agreement had been dismissed by the Chief Court as premature and the period of its prosecution should be included under s. 14 of the Limitation Act which would bring the suit within time.

The District Judge gave a decree to the plaintiff for Rs. 24,393-1-1, with proportionate costs, against the estate and the assets of the original purchasers.

Defendant No. 4, who was a sub-transferee and in possession, appealed to the Chief Court against the decree; and the plaintiff preferred a cross-appeal claiming Rs. 5,652 more than he had been awarded.

Mr. *Ramaswamier* for the plaintiff.

The Hon'ble Mr. *V. Bashiyam Iyengar* for defendant No. 4.

The judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

The facts of this case are so fully stated in the judgment of the lower court that it is unnecessary to recapitulate them. Only such facts as are necessary for the purpose of deciding this appeal will be briefly set forth.

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The plaintiff and his brother sold a coffee estate to defendants Nos. 1 to 3, who represented the Hassan Coffee Association, for Rs. 60,000. For a portion of the purchase-money which remained unpaid, namely, Rs. 21,600, an agreement (Ex. *A*) was entered into with defendants Nos. 1 to 3 on the 18th December 1886. The defendants agreed to liquidate the said amount by delivery of the entire coffee crop, of the estate sold, for the first year and half the crop for the second and succeeding years, at certain fixed rates. The agreement also provided for payment of certain debts out of the crop, if the plaintiff and his brother failed to discharge the debts.

On the said agreement the plaintiff and his brother brought a suit (on the 17th December 1887), No. 16 of 1887, against the said defendants, which was dismissed on the 6th September 1889. *Vide* Judgment of this court in Regular Appeal No. 46 of 1889. While that suit was pending in appeal, defendants Nos. 1 to 3 sold the estate to Venketappa Shetty and Virai Gowda, who resold the property to the present defendant No. 4 on the 20th November 1889 by Ex. *E*. The present suit was brought by the plaintiff to recover Rs. 46,990-8-5 for non-fulfilment of the terms of the agreement (Ex. *A*) and for enforcement of his lien on the estate.

The District Judge gave judgment for Rupees 24,393-1-1 with proportionate costs against the said estate and against the assets of the Coffee Association in the hands of defendants Nos. 1 to 3.

Defendant No. 4, who is now in possession of the estate, has appealed against the decree, chiefly contending that the plaintiff had no lien on the estate,

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that the claim was barred by limitation and that, even if it was not barred, nothing was due to the plaintiff. The plaintiff has preferred a cross-appeal claiming Rs. 5,652 more than the amount awarded by the District Judge, as the value of 419½ maunds, and Rs. 195, as cart-hire, twice charged erroneously by the District Judge.

It will be convenient to dispose of the appeal of defendant No. 4 first and to consider the plaintiff's cross-appeal last.

The first and principal question for decision, in connection with the appeal of defendant No. 4, is, whether the plaintiff has a lien on the estate sold by him for any amount due on the agreement (Ex. *A*). It was argued that, although the sum of Rs. 21,600 mentioned in Ex. *A* was the balance of purchase-money, yet, as there was a totally distinct and independent contract, for the delivery of coffee at certain rates in liquidation of that balance, which, for purposes of conveying the estate absolutely, was regarded as adjusted, and the consideration for the agreement was the said sum of Rs. 21,600, which was treated as a separate loan or advance, the agreement, Ex. *A*, was a substitution for the lien and a separate bargain which altogether destroyed the lien.

If we had to decide this question simply upon a construction of the sale-deed (Ex. *No. 4*), the agreement (Ex. *A*) and the karars referred to therein (Exs. *Nos.* 7 and 8) it might, perhaps, be contended that the unpaid balance of purchase-money, Rupees 21,600, was, for the purposes of the agreement Ex. *A*, treated as a loan or separate advance to the vendees in consideration of the fulfilment of the terms

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and conditions set forth therein; but we have to take into consideration all the documents as also the terms and conditions of the sale-deed executed to defendants Nos. 4 to 6, (Ex. *E*) and see what was the intention and understanding between the original vendors and vendees and whether the lien was preserved or abandoned. That the produce of the estate was regarded as security for the due fulfilment of the terms of Ex. *A* is quite evident from the recitals contained in Ex. *C* and Ex. *No. 8*, which are to the effect, that the vendees will not be entitled to the produce of the estate till the said sum of Rs. 21,600 is liquidated. In Ex. *E*, executed to defendant No. 4, certain debts are referred to, one of them being the debt due to the plaintiff under the sale-deed, Ex. *No. 4*, apparently for a balance of the unpaid purchase-money, and it is expressly stated in Ex. *E* that there were no encumbrances on the estate except the debts specifically mentioned in the document. If the plaintiff had no lien on the estate for the amount specified in Ex. *A* or any portion thereof that remained unliquidated, there was no necessity for referring to the plaintiff's debt, as well as the other debts mentioned, as incumbrances on the estate. This express reservation of the lien and the transfer of the estate to defendants Nos. 4 to 6 with the liability to pay the debts out of the income of the estate proves clearly the intention of the parties from the commencement. It is quite evident that, notwithstanding the execution of a separate agreement for the unpaid balance of the purchase-money, the plaintiff retained the lien and the vendees and their assignees also allowed the lien to continue and subsist till the whole amount, Rs. 21,600,

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was liquidated. In fact, the debt mentioned in Ex. *E* was what was roughly calculated to be due to the original vendors on the date of that sale-deed.

Under the Transfer of Property Act, s. 55 cl. 4 (*b*), it may be said that the vendor has a charge on the land in the hands of the buyer only. But that Act has not been extended to Mysore. As the courts in Mysore are Courts of Equity and Good Conscience, in the absence of any restrictions or limitations expressly laid down by law, we must apply the rule of equity and hold that the vendor possesses an equitable lien for unpaid purchase-money against the vendees and sub-purchasers with notice.

The learned counsel for defendant No. 4 in this appeal (the Hon'ble V. Bashiam Iyengar) quoted certain English cases as favoring his contention, that the agreement Ex. *A* was a substitution for the lien.

The principal case quoted was *Nairn* v. *Prowse*(1) That case is clearly distinguishable from the present. There, the vendor's equitable lien upon the estate was regarded as lost by taking a special security by way of a pledge of stock, for a long annuity of £100 a year, which was an absolute security in the vendor's hands. Even, in that case, the Master of the Rolls expressed himself very guardedly to the following effect:—"Therefore, without entering into the general question whether every security taken necessarily amounts to a waiver of the lien of the vendor, I am clearly of opinion that this vendor has, by taking this pledge, waived his equitable lien." In this case, there was no pledge or security for the due delivery of the coffee produce. If the vendors had taken some other

(1) 6 Ves., 752.

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security in substitution for the ordinary lien, they might be considered as having abandoned their lien.

The other cases quoted by the learned counsel are all cases referred to in Dart on the Law of Vendors and Purchasers, ed. of 1888, pp. 825 to 836. The principle laid down in all those cases is, that, in the absence of an express agreement and of those circumstances from which the court can imply a contrary intention, the vendor, notwithstanding the execution of a conveyance containing the above expressions and acknowledging payment of the purchase-money and notwithstanding delivery of possession to the purchaser, retains a lien upon the estate, whatever may be its tenure, for so much of the purchase-money as in fact remains unpaid. The lien is, in all cases, one of intention and construction, the test being whether the vendor has taken some other security in substitution for the ordinary lien, the onus being on those who deny the existence of the lien to make out their case.

The leading case of *Mackreth* v. *Symmonds*(1) was also referred to. The inferences deducible from that case and the other cases referred to in the notes at page 355 of Vol. I. of White and Tudor Lea. Cas. Eq. are:—

1. that *primâ facie* the lien exists without any special agreement for that purpose, and it remains with the purchaser to show that, from the circumstances of the case, it results that the lien was not intended to be reserved;

2. that, in those general cases in which there

(1) 15 Ves., 329.

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would be the general lien as between vendor and vendee, the vendor will have the lien against a third person who had notice that the money was not paid;

3. that, where a security is taken for unpaid purchase-money, the existence of the lien depends upon the question, whether it was intended to be reserved, or whether credit was exclusively given to the person from whom the other security was taken;

4. that a mere personal security for the purchase-money, as a bond, or bill of exchange (although with a surety), or a promissory note, whether negotiated or not, will not, without more, be sufficient evidence of the intention of the vendor to give credit exclusively to the purchaser, or to his surety, so as to take away the lien;

5. that, where it appeared that the note, bond, covenant or annuity was substituted for the consideration money and was in fact the thing bargained for, or when the responsibility of a third person for the purchase-money is taken, the lien will be lost.

In several cases it was held that taking a bond from the vendee for the purchase-money or the unpaid part of it, affected the vendor's equity, as being evidence that it was waived, but the weight of authority and the better opinion is that, taking a note, bond or covenant from the vendee, for the payment of money is not of itself an act of waiver of the lien, for such instruments are only the ordinary evidence of the debt. *See* Kent's Commentaries, vol. IV, p. 152, ed. 1889.

In this case, there was no security taken in substitution for the lien, nor was any bond or covenant taken from a third person. The intention of the

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vendors is clear. They expected to get the produce of the estate on which they had their lien till the debt was liquidated. That was their intention and that was also the understanding of the vendees and their assignees. It must, therefore, be held that the plaintiff had not lost his lien on the estate for any money that may be due to him under the agreement Ex. *A*.

The next question is one of limitation. It was conceded that, if s. 14 of the Limitation Act applied to this case, the period occupied in the prosecution of Suit No. 16 of 1887 may be deducted in computing the limitation for this suit under Article 111. It was contended, however, that s. 14 was inapplicable, as the former suit was brought before the cause of action actually accrued. S. 14 provides that, in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant, shall be excluded when the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

The former suit was based on the agreement Ex. *A* and this suit is also based on the same document. The cause of action is the same. The plaintiff believed, when he instituted the former suit, that the cause of action had arisen, but this court held that the suit was premature and that it had, therefore, no jurisdiction to entertain it. It seems, therefore, clear that this case falls within the purview of s. 14 and the plaintiff is entitled to deduct the twenty months and

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twenty-one days occupied in prosecuting the other suit. That deduction being made, the suit is in time, even applying Article 111.

Now the next question for decision is, what is the amount due to the plaintiff under Ex. *A*. There are one or two points of difference between the parties which have to be determined before the mode of calculation can be laid down.

In the first year in which the full crop was due, certain cash payments were made on account of the plaintiff—

Rs. 5,130-0-0 to Siddai Gowda.
„ 238-8-0 to Parappa.
„ 3,000-0-0 to Virai Gowda.

The last item (Rs. 3,000) was made over in May 1887. The plaintiff has no objection to the first item being deducted from the sum of Rs. 21,600, as that debt is specifically referred to in Ex. *A*. The second item appears to have been paid before the breach took place. With regard to the third item, it is contended that it should be deducted from the profits due to the plaintiff. This appears reasonable.

Vide Exs. *Nos. 5* and *6*. The default in delivery of the whole produce of the first year took place prior to the date of Exs. *Nos. 5* and *6*.

Another dispute is, that the defendants claim deduction for Rs. 5,000 and not Rs. 3,000 only on account of the payment of the debt of Virai Gowda. The District Judge has given good and sufficient reasons for holding that set-off should be allowed only to the extent of Rs. 3,000.

The payments in cash during the first year, amounting to Rs. 5,368-8-0, should be deducted from Rs.

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21,600; and from the balance should be further deducted Rs. 4,135-7-7, as admitted in the plaint, being the value of coffee delivered to Messrs. Binny and Co., namely, 248 maunds of parchment coffee and 93 maunds of native coffee. The payments made in the first year would then amount to Rs. 5,368-8-0 + Rs. 4,135-7-7 = Rs. 9,503-15-7. This being deducted from Rs. 21,600, the balance of unpaid purchase-money in the first year would amount to Rs. 12,096-0-5.

In the second year, there was a cash payment to Messrs. Binny and Co., on account of the plaintiff of Rs. 4,080. To this must be added the debt assigned over by Virai Gowda, Rs. 3,000; in all, Rs. 7,080. Owing to default made by the defendants in the very first year, the quantity of coffee that had to be delivered at once is 1,728 maunds of parchment coffee which, at Rs. 12-8-0 per maund, amounts to Rupees 21,600. Deducting from this Rs. 7,080, the balance due to the plaintiff is Rs. 14,520.

The plaintiff, in his cross-appeal, claims one maund for every five maunds of parchment coffee on account of the weight of shells. This need not be allowed, as payment in cash is decreed. The objection as to excess cart-hire does not arise under the mode of calculation adopted above.

The District Judge's decree will be modified accordingly and costs assessed in both the courts on sums allowed and disallowed.

Decree modified, with proportionate costs.

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Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

MUNI NANJA (DEFENDANT) *v.* MUNIGA (PLAINTIFF).* 1892 *August* 20.

Res judicata—Code of Civil Procedure (Act XIV of 1882), s. 13 Expl. II—Ground of defence—Limitation—Debt—Voluntary payment—Contract Act (IX of 1872) ss. 69, 70.

The defendant having by previous suit obtained possession of certain land from the plaintiff, the latter sued him to recover the value of improvements made by him to the land while in his possession and also to recover monies alleged to have been paid in clearing off mortgages.

Held, that the question of allowance for improvements should have been decided in the former suit for possession, it being a matter which might and ought to have been made a ground of defence in such former suit; and it is now *res judicata.* (Code of Civil Procedure, *s.* 13, *Expl.* II).

Held also, that the redemption of the mortgages, even if in fact made by the plaintiff,| were voluntary payments made not for the defendant's benefit but to perfect the plaintiff's own title and as part of the consideration for the alleged sale to him. That sale, having been held by the Court in the former suit, not to be true, the plaintiff had no legal title to the land and no manner of interest in it. Therefore such payments would not come under either *s.* 69 or *s.* 70 of the Indian Contract Act.

Further, that the limitation for any such payment would be three years from the date of such payment, if it was a debt at all; but if it was not in its inception a debt, the subsequent dispossession of the plaintiff would not make it one and would not give any fresh start for limitation.

In this suit the plaintiff stated that certain property had been originally mortgaged to him and then sold outright by predecessors in title of the defendant, and that he had been at the same time authorised by his vendors to redeem certain mortgages upon the property. The property had, however, been taken out of his possession by the defendant, who had obtained a decree for the same from the

*Appeal No. 46 of 1892 against original decree No. 892 of 1890 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 10th day of September 1891.

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Chief Court in appeal, which court further held the sale-deed set up by the present plaintiff not to be a true and genuine one.

The plaintiff relied on the following passage in the Chief Court's judgment:—

At all events we think it inconvenient to club all these transactions together in this suit and to decide the plaintiff's liability to pay the whole or any portion of such moneys spent by the defendant. We leave it open to him to proceed against the plaintiff if he has to recover any money on this account from him.

The plaintiff thereupon set forth in his plaint that "the Chief Court permitted him to file a suit against the defendant for the recovery of the amounts due under the mortgage bonds," and he sued to recover not only such amounts but also the value of improvements he alleged he had made to the property while in his possession, and that the same might be charged on the property.

The defendants alleged all the bonds to be forgeries and the payments fictitious; they also claimed that the suit was barred by limitation.

The Munsiff gave the plaintiff a decree making the amount chargeable on the property.

The defendant appealed to the Chief Court.

Mr. *B. Nunjundappa* for the appellant.

Messrs. *S. Nanjappa* and *S. Subbarayer* for the respondent.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows:—

The defendant in this suit sued the present plaintiff for possession of certain plots of land, obtained a decree and got possession in execution. The object of the present suit was to recover from the defendant the money which the plaintiff had expended in

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improving the property when he had possession thereof, and the money which he had spent to relieve the property from certain incumbrances which had been created by the defendant's predecessors in title. The Munsiff of Bangalore awarded Rs. 50 as compensation for improvements and Rs. 290 which was the aggregate of the debts discharged by the plaintiff. The defendant has appealed from the decree.

The claim to the value of improvements is not sustainable. If the plaintiff was entitled to receive compensation, the point ought to have been urged when the suit for ejectment was brought against him. It was a question for the determination of the court which decreed ejectment whether the plaintiff in that suit was entitled to possession unconditionally or upon any payment. The point, which might and ought to have been urged as a ground of defence in that suit not having been urged, the plaintiff ought not to be allowed to agitate it by a fresh suit.

The point which next calls for decision is the plaintiff's right to recover the money alleged to have been paid by him to certain creditors. The plaintiff's case was that the defendant's uncle and cousins had borrowed from sundry persons upon the mortgage of their land, and that the uncle sold the land to the plaintiff in 1887, and authorized him to redeem the mortgages. The money alleged to have been paid to those creditors is what the plaintiff has sought to recover from the defendant, who denies that there were any debts at all. This question of fact we do not pause to determine, as we are satisfied that, assuming the plaintiff did pay money as alleged by him, he has no claim

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as against the defendant. If the plaintiff paid any money, it is obvious that he did it to perfect his own title; and not for the benefit of the defendant. The payment was made as part of the consideration for the alleged sale and not to benefit the defendant's estate. If the payment was true the plaintiff could not have at that time looked upon it as a debt which he was entitled to recover from the defendant. If it was not in its inception a debt to be recovered from the defendant, the subsequent dispossession of the plaintiff does not make it a debt and that event doesnot become a starting point for computing limitation. If it was a debt at all, the suit ought to have been brought within three years from the date of each payment, and the suit which was filed more than three years afterwards was barred by limitation. There is no reason for contending that the plaintiff was interested in making the payment. We found that the sale alleged to have been made to him was not true and that he had no legal title to hold the land. As he had no manner of interest in the land the payments, if any, were voluntary and cannot be recovered. In a similar case, *Ramachar* v. *Muneappa*(1) this question has been discussed by this court and it has been held that payments made under the circumstances alleged by the plaintiff in this suit were voluntary and that no decree ought to be given under section 69 or 70 of the Contract Act. We concur in that judgment, and we hold that neither under section 69 nor 70 of the Contract Act can the suit be maintained. We reverse the decree and dismiss the suit with costs throughout.

Appeal allowed. Suit dismissed with costs.

(1) R. A. No. 253 of 1891.
See Appendix.

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Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 August 24.

MRS. E. T. POTGEITER (PLAINTIFF) *v.* MR. F. B. PEDROZA, SECRETARY OF THE EURASIAN AND ANGLO-INDIAN ASSOCIATION, (DEFENDANT).*

Companies Act (X of 1866)—*Unregistered Company—Authority of Secretary—Code of Civil Procedure (Act XIV of* 1882), *s.* 53 (*f*) —*Bonâ fide mistake—Costs.*

The E. and A. Association of Mysore was sued through its Secretary for specific performance of a contract and to compel a conveyance. It appeared that the Association was not registered under the Indian Companies Act (No. X of 1866) which regulates companies in Mysore.

Held, that the Association, being unincorporated, the defendant who is styled its Secretary, has no legal power to represent the members in his official capacity and a suit filed against him alone cannot be recognised as a suit against the Association. The plaint should therefore be returned for amendment under the Code of Civil Procedure *s.* 53 (*f*), and as there appeared to be a *bonâ fide* mistake on the part of the plaintiff each party should bear his own costs.

The plaintiff was a settler at Sausmond and sued the defendant as Secretary and representative of the Eurasian and Anglo-Indian Association of Mysore to have her right declared as owner by purchase from the Association of certain immovable property in the Settlement and to obtain a conveyance of the same.

The Munsiff decreed that the defendant or his successor in office, if the defendant be not Secretary to the Association, do make register and grant to the plaintiff a sale-deed in the terms of the contract of sale (Ex. *A*) upon the plaintiff paying such charges as she may be bound to pay under the Stamp and Registration laws and rules, and dismissed the rest of the plaintiff's claim; each party to bear their own costs.

* Appeal No. 334 of 1891 against original decree No. 935 of 1890 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 30th day of June 1891.

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The plaintiff appealed to the Chief Court.

Mr. *L. Srinivasiengar* for the appellant.

Mr. *J. C. S. Lawrance* for the respondent.

On the argument of the appeal the question arose whether the Association could sue or be sued as a Registered Company: and the Chief Court found on the record no evidence upon this point, remarking at the same time that the Munsiff ought to have recorded some evidence before he allowed the suit to be brought against the Secretary as representing the Association.

It appeared that a similar Association, of which that in Mysore seemed to be an offshoot, had been registered in Madras under Act VI of 1882; but that Act is not in force in Mysore and it was not shown whether the Mysore Association was an independent body co-operating for certain purposes with the Madras Society or whether it was a branch Association established by that at Madras and subject to the latter's control and supervision.

The Companies Act in force in Mysore is Act X of 1866; but there was no evidence that the Eurasian and Anglo-Indian Association of Mysore was registered under that Act, or that notice of the suit served on the Secretary would bind the Association.

The Chief Court therefore remanded the case to the Munsiff to receive such evidence on this point as the parties might adduce and to submit the same with his finding to the Court.

On return of the record, the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) passed the following judgment:—

The Munsiff has now submitted a finding to the

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effect, that the Association called "The Eurasian and Anglo-Indian Association" of Mysore is not a corporation. No objection has been filed to this finding. As the Association is unincorporated, it is obvious that the defendant, who is styled Secretary to that Association, has no legal power to represent the members in his official capacity, and that a suit filed against him alone cannot be recognized as a suit filed against the Association. The Munsiff was wrong in entertaining the suit, and the decree, which has been passed by him, directing the Association to execute a conveyance, cannot be sustained. We reverse the decree, and direct the Munsiff, under section 53 (*f*) of the Code of Civil Procedure, to return the plaint, which is wrongly framed by reason of non-joinder, to be amended within a time to be fixed by him. As the plaintiff appears to have made a *bonâ fide* mistake, each party will be directed to bear his costs of this appeal.

As this unincorporated Association has been acquiring and selling land and as it appears to consist of many members, more than twenty, as has been represented to us, a copy of this judgment will be forwarded to Government and to the Registrar of Companies.

Decree set aside. Plaint to be amended. No costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 December 3.

VENKATA RAYAPPA (PLAINTIFF) *v.* SRIRAMA NAGIA AND ANOTHER (DEFENDANTS).*

Consideration—Ascertainment of real consideration—Illegality of consideration—Contract Act (IX of 1872), s. 23—Transfer of an office—Shanbog.

The registered shanbog of a village agreed in writing to transfer

*Appeal No. 383 of 1891 against original decree No. 156 of 1891 of Mr. Booden Sheriff Sahib, Munsiff of Maddagiri, dated the 20th day of November 1891.

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his office if the transferree would pay off a certain debt due by the shanbog and give him a fixed yearly maintenance. By a bond of the same date the transferree undertook with the shanbog's creditor to discharge such debt. The transferee subsequently sued for delivery up and cancelment of his bond as being void and on an illegal consideration.

Held (by the Division Bench) that although the agreement and the bond were executed as two separate instruments it must be inferred from the conduct of the parties that they intended to treat them as substantially forming one transaction; and that looking at the substance and not the form of the transaction, the true consideration was the contemplated transfer of the office of shanbog.

Held (by the Full Bench, THUMBOO CHETTY, C. J. and KRISHNA MURTI, J., RAMACHENDRA IYER, J. *dissenting*) that the consideration of the bond is illegal.

Per RAMACHENDRA IYER, J.—The agreement partakes more of the nature of a family arrangement than a bare sale of an office and is not void.

Mr. *S. Ramaswamiengar* for the appellant.

Mr. *L. Srinivasiengar* for respondent No. 1.

The facts of the case are sufficiently set out in the order of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) which was as follows:—

The object of the suit was to obtain a declaration that a bond which was executed by the plaintiff to defendant No. 1 on the 30th May 1891 was null and void and to get it cancelled under section 39 of the Specific Relief Act. The Munsiff of Maddagiri dismissed the suit and the plaintiff has appealed from the decree.

The plaintiff and defendant No. 2 are cousins. The latter is the registered shanbog of a few villages in Maddagiri Taluk and he was indebted in a large sum of money to defendant No. 1. He agreed to transfer his office to the plaintiff if the latter undertook to discharge the debt which was due to defen-

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dant No. 1 and to pay a certain sum every year to him (defendant No. 2) for and on account of his maintenance. On the 30th May 1891, an agreement was executed embodying these conditions and defendant No. 1 was an attesting witness to that document. On the same day, the plaintiff executed a bond to that defendant, agreeing to discharge the debt which defendant No. 2 owed to him and which was secured by a bond dated the 22nd November 1881.

The plaintiff contends that the consideration for the bond was the transfer of an office, that the consideration was illegal and that the agreement was void. The advocate of defendant No. 1 contends that the question of illegality of consideration does not arise in the case, that the bond in suit was quite distinct from the agreement, to which his client was no party, and that the transfer of the office not having been mentioned in the bond as consideration for its execution by the plaintiff, the question which the court had to determine was, whether there was anything in the bond itself which had the effect of making it a void transaction.

Although the agreement and the bond were executed as two separate instruments, yet we infer from the conduct of the parties that they intended to treat them as substantially forming one transaction. The documents were executed contemporaneously and defendant No. 1 was made to attest the agreement which obliged the plaintiff to discharge the other defendant's debt. The intention was to acquaint defendant No. 1 with all the facts so that he might know what induced the plaintiff to execute the bond in question.

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If it was the intention of the parties to treat the bond as altogether distinct from and independent of the agreement, the consideration which induced the plaintiff to execute it would have been stated in it. It was not shown that the obligee had put himself to any inconvenience or shown any favor to the original debtor at the request of the obligor, or that in fact any consideration flowed from him at all. Looking at the substance and not the form of the transaction, we hold that the true consideration was the contemplated transfer of the office of shanbog.

This finding raises the second question, whether the consideration was lawful. This question being one of some importance, we direct that it be argued before a Full Bench. As it was mentioned to us at the Bar that contracts similar to the one before us were recognized by the Maharaja's Councillors, we think it will be of assistance to us if the advocates will produce copies of orders or judgments passed in Council.

The following orders were passed by the Full Bench of the Chief Court* :—

THUMBOO CHETTY, C. J.—The facts of this case are clearly stated in the Order of Reference made to the Full Bench. It is, therefore, unnecessary to re-capitulate them.

It was found by the Division Bench that the true consideration for the plaint bond was the contemplated transfer of the office of shanbog, and the

* *Present*—T. R. A. THUMBOO CHETTY, Chief Judge; A. RAMACHENDRA IYER and P. N. KRISHNA MURTI, Judges.

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question referred for the opinion of the Full Bench is, whether the consideration was lawful.

I have no hesitation in answering the question in the negative. We have not been referred to any decisions of Government bearing upon the point.

By a General Circular Order No. 5, dated the 22nd October 1872, it is declared that all emoluments annexed to offices of village servants (of which the shanbog is one) are inalienable and that claims to succession to, or to the possession of, hereditary village offices are not to be cognizable by any of the ordinary Civil Courts. The same restriction and prohibition have been laid down in Rule 43, para 5, of the Rules issued under the Mysore Land Revenue Code with Notification No. 150, dated 22nd July 1890. In the revised Rules for remuneration of patels and shanbogs published with the Chief Commissioner's Notification No. 219, dated the 27th October 1874, there are similar provisions, and it is clearly laid down in Rule XXXII, that "the District Officer will be the sole judge of the competency or otherwise of the person on whom devolves the performance of the duties of an office." It is thus evident that it is in the interests of the village public service, the Government have retained in their own hands the power of recognizing a person as the village shanbog or patel competent to hold the office, even though he may possess hereditary right to the office, and declared, by notifications having the force of law, that the lands of village officers held on condition of service or other emoluments appertaining to the office of shanbog or patel are inalienable by sale, mortgage, gift, or otherwise.

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In section 23 of the Contract Act, it is stated that the consideration or object of an agreement is lawful unless it is forbidden by law. In the present case, the consideration for the plaint bond is the transfer of the office of shanbog, registered in the name of defendant No. 2 in the Government records, to that of the plaintiff. Such transfer is not permissible without the sanction of the Deputy Commissioner. The alienation of such offices by one person to another by sale, mortgage, gift, or otherwise is clearly forbidden by the notifications aforementioned. The consideration for the plaint bond is therefore not lawful.

RAMACHENDRA IYER, J.—The plaintiff and defendant No. 2 are divided cousins, and the latter is the registered shanbog of a few villages. He was indebted to defendant No. 1, and for the purpose of discharging that debt, he entered into an agreement with the plaintiff in May 1891, undertaking to resign his appointment and to get the plaintiff nominated in his stead. The consideration for the promise was the agreement of the plaintiff to liquidate a debt due by the shanbog and to pay a certain sum of money every year for the maintenance of the shanbog and his widowed daughters-in-law. The plaintiff executed a bond to defendant No. 1 binding himself to pay the debt which was due from the shanbog. He brought a suit for the cancellation and delivery up of the bond, on the ground that it was void, inasmuch as the consideration therefor was illegal. The point for determination is, whether the agreement made by the shanbog promising to resign his appointment in favor of the plaintiff, and which was

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the consideration for the bond executed by the latter to defendant No. 1 was prohibited by law or was opposed to public policy, and whether we are bound to hold that it was void and of no effect.

If the office was not hereditary, I should have no hesitation in holding that an agreement to resign it in favor of another for a pecuniary consideration, was opposed to public policy, and ought not to be countenanced by a Court of Justice. If a person is appointed to hold a particular office under the Government, it pre-supposes that he was selected by reason of his moral character and qualifications; and there is good sense in prohibiting the sale, gift or other alienation of such office. But when an office is made hereditary, the element of individual capacity disappears and the question arises whether the rules which prohibit the sale or gift of offices generally apply with all their force to such offices.

The rules which have been made by Government as to the disposal of claims to hereditary village offices and the dismissal of village servants are to be found on page 21 of the rules published under Notification dated the 22nd July 1890. These rules show that it is the wish of the Government that the duties of the office should be performed by that member of the family who is most capable of performing them, that the office should remain in the family only, and that it is only in exceptional cases, that is, when the huqdar happens to be a minor or a woman, that a stranger can be appointed to perform the duties. The rules convince me of the unsoundness of the argument urged by the advocate of defendant No. 1, that a hereditary office is of the nature of private pro-

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perty, and that as such it may be alienated. The alienation of a hereditary village office for pecuniary consideration seems opposed to the rules made by the Government.

Another argument which was urged by the respondent's advocate is, that an agreement to resign the office in favor of the next heir ought to be dintinguished from a sale made in favour of a stranger, and that the agreement ought to be regarded as a family arrangement. This argument does not seem to be devoid of force. There being no dispute that the present incumbent has no sons or undivided brothers, and that the next heir is the plaintiff, who is his divided cousin, the question is, whether we ought to set aside an arrangement by which the next heir is to take the assets of the incumbent, to discharge his debts and to maintain him for life. If the office-holder proposes to resign at once in favor of the man who will eventually succeed him and if the successor undertakes to maintain him and to discharge his debts, I hesitate to condemn it as immoral or illegal. It is not a severance of the emoluments of the office from the office and it is not therefore opposed to clause *d* of rule 5. My impression is, that the agreement partakes more of the nature of a family arrangement than a bare sale of an office and that it is not void.

KRISHNA MURTI, J.—The question submitted for the decision of the Full Bench is, whether the consideration, which is a promise by the registered shanbog to resign the appointment and to have it registered in the name of the plaintiff, is lawful.

The circumstances under which the considera-

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tion or object of an agreement is unlawful, are laid down in section 23 of the Contract Act; and those which seem to have any applicability to this case are:—

(1) when it is forbidden by law; *or*

(2) is of such a nature that, if permitted, it would defeat the provisions of any law, *or*

(3) the court considers it as opposed to public policy.

As far as I am aware there is no written or statute law in Mysore forbidding in express terms the transfer of a public office. The British Indian Legislature, which is in advance of us in this respect, has enacted, in section 6 *(f)* of the Transfer of Property Act (IV of 1882) that "a public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable." There is no such provision of law in Mysore. The notifications and rules, which regulate the succession to the office of shanbogs and the enjoyment of the emoluments by the officiator, do not, in express terms, forbid the transfer of such an office *inter vivos*, except by way of implication and inference, and these will be referred to further on. As has been pointed out by the learned advocate for the respondent, these rules have been framed with the object of keeping the emoluments attached to the office without the possibility of their being severed from it. All that the rules say is, that it is the officiator alone who shall enjoy the emoluments. The question before us is not one involving the severance of such emoluments at all, but the transfer of the office itself by an act *inter vivos*.

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Kristna Row v. *Shamannah*(1) was cited in the course of argument as laying down the rule that the exchange of Government appointments was opposed to public policy and any contract entered into for such purpose was illegal and void. This case does not refer to the village service which is somewhat different from other public appointments, in that the selection of the servant is limited to members of a single family; but the principle of the rule is not inapplicable to it. In *Hanumanthappa* v. *Soobroyappa*(2) Sandford, C. J., held that the consideration, which consisted of the sale of a half-share of a shanbog's inam land was bargaining in the emoluments of a public office and that the law looked upon it as opposed to public policy. This rule does not go beyond the prohibitions contained in the rules framed under the Land Revenue Code, which have been quoted by both my learned colleagues, and is not of help in solving the question now under consideration.

These are all the decided cases by this court which have any bearing on this point, and the first case does not relate to an appointment of the kind in consideration. We must therefore see whether the fact that the appointment of a shanbog usually called and known as hereditary, being transferred by its holder in favor of his next heir makes any difference.

It was contended in the course of the argument that the transaction partook of the nature of a family arrangement and that therefore it was not opposed to public policy. This contention raises the question

(1) 10 M. L. R., 229. (2) 5 M. L. R., 40.

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as to whether the special treatment which the Government has thought fit to accord to this class of public officers puts them on a footing different from the holders of other public offices. I presume there is no dispute in regard to viewing them as public officers. Although in former times the emoluments were obtained in the shape of a land inam and other perquisites levied directly from the rayats, yet all those special sources of income have been now discontinued, and the shanbogs obtain their remuneration by money payments made from the Government treasury or by a deduction allowed to them in the annual assessment they have to pay for the lands held by them (see Rules sanctioned by the Government of India and published with the late Chief Commissioner's Notification No. 219 of the 27th October 1874). The mode of the payment does not indicate any difference and the interval whether of a year or a month at which such payments are made does not by itself introduce a differentiating element. I can likewise see no great or substantial difference in the mode of selecting and appointing these officers. The possession of the required qualification is an essential condition with regard to both classes of officers.

The late Chief Commissioner's Notification of the 9th September 1835, which has been more than once held by this court to have the force of law, distinctly lays down the rule in the case of shanbogs in the following words:—

"5. It is further declared that while village offices are, as a general rule, to be considered hereditary, and to be enjoyed by father and son in succes-

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sion, it is to be understood that in any case wherein it may appear to the Superintendent of the Division that the hereditary claimant to the office is unfit or unworthy from incapacity or bad character, it will rest with the Superintendent to reject his claim and to appoint another person properly qualified in all respects, preference being given to a relative of the late Mirasidar."

Section 32 of the rules of the 27th October 1874 continues this power of selection in the District officer and makes him the sole guide of the candidate's competency or otherwise.

The rules framed under the Land Revenue Code (No. 43 (5)) contain the same directions and indicate the correct view to be taken of such questions. The rule applicable to the present subject is as follows:—

"In the disposal of claims to village offices, it must be remembered that the hereditary principle cannot be allowed to over-ride administrative necessities. It is essential that the holder of a village office shall be able to perform the duties. It follows therefore that, if the hereditary claimant to the office is unfit from old age, incurable disease, incapacity or bad character, it will rest with the Deputy Commissioner to appoint the next heir-at-law competent to hold the office."

Exceptions are, however, made as an act of grace, generally in favor of minors and in special cases in behalf of sonless widows. Claims to succession to or the possession of, hereditary village offices, are not to be cognizable by any of the courts of judicature. (Rule 6 of the Notification of 1835).

On a careful consideration of these rules it seems

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to me, that the hereditary principle inculcated by them does not go beyond limiting the field from which those officers are to be selected, and defining the mode, according to which the eligible candidates are to be preferred one over the other. I cannot look upon them in any other light than as a set of instructions given for the guidance of the executive officer of Government who has the power vested in him of making such appointments. It is only the Government in its executive capacity which can take cognizance of all such matters and, as the rule distinctly says, "the hereditary *principle* cannot be allowed to over-ride administrative necessities." The arrangement is founded upon practical convenience. But for the assurance that the selection would be made from the family of such office-holders, it would be impossible to find duly qualified persons in many small and out-of-the-way villages. The rules, which are founded upon this necessity under which the Government is placed to find the required supply of this class of officers, cannot be enlarged so as to be the foundation of a right as understood by jurists and capable of being enforced in a court of justice by an action. In that instructive book of Lindley's, which it would be difficult to replace, on the subject of the first principles of Jurisprudence, a right is defined to be neither more nor less than a legal power to compel. It is said "that every right is as such accompanied by a power of compelling the performance of or forbearance from, some positive act," and that "this power of compulsion can as a rule only be exercised with the aid of a judge" (Lindley's Introduction to the Study of

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Jurisprudence pp. 52, 53). The same idea of a legal right is conveyed by the definition given of it in Holland's Elements of Jurisprudence (4th edition, page 70) that it is "a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others." Viewing the question by the light of the rules quoted above, it seems to me that it cannot be contended that defendant No. 2, who is the present holder of the shanbog's office has in him any capacity to control the actions of others, which he ought to possess in the event of his possessing the right of disposition over this office. He is entitled to hold it as long as he continues to be capable and worthy, and may if he likes exercise his freedom of resigning it. But what right or capacity has he of controlling its disposal in favor of any one else. The Deputy Commissioner, as the representative of the executive Government, steps in to fill up the vacancy and the directions referred to already guide him in his action. When defendant No. 1 has thus no right of property over this office, it is in my judgment a confusion of thought to contend that the transfer evidenced by the document in suit is a family arrangement which would in any way bind the Government or the other members of the family, if any. The transaction is certainly opposed to public policy, inasmuch as, if it is held binding and legal, it puts the real claimant under the unmerited disadvantage of losing five hundred rupees and imposes upon him the liability of maintaining two persons admittedly out of the emoluments attached to the office. A man encumbered with such heavy liabili-

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ties is least likely to discharge the duties of the Government office efficiently, and it is by no means impossible or improbable that the heavy liabilities which the plaintiff has undertaken would excite the sympathy of the executive officer of Government entrusted with the duty of making such appointments in his favor and thus indirectly and improperly influence his judgment.

"The public has an interest in the performance of their duty by public servants and is entitled to be served by the fittest persons procurable. The public has a right to the exercise, by such executive officers of Government, of their best judgment in selecting officers for it." (Anson's Contracts, 6th ed., page 193). Whatever may, however remotely or indirectly, influence the exercise of such judgment, must not be upheld as it is opposed to public policy.

In this view of the case, I consider that the transfer of an appointment by an act *inter vivos* between these parties, though not forbidden by written law, is yet opposed to public policy, having for its tendency the severance or the dimunition of the emoluments attached to the office of shanbog and should not therefore be countenanced by a court of justice. As it is not the disposition of any right possessed by defendant No. 1, the transaction is not entitled to be viewed with favour as a family arrangement or as a settlement of one member's assets and liabilities. There is no difference between a shanbog's office and any other public office under Government so long as it is sought to be transferred for pecuniary consideration, and the ruling of the

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case *Krishna Rao* v. *Shamanna*(1) already referred to, is a direct and binding authority for holding that the consideration for the payment of the debt by the plaintiff is opposed to public policy and is therefore illegal. My answer to the question referred by the Division Bench is that the consideration is not lawful.

Appeal allowed. Suit decreed.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1892 *November* 7.

S. PUTANNA, (DEFENDANT No. 3) *v.* CHUTHUR SING (PLAINTIFF) AND ANOTHER (DEFENDANT No. 1).*

Dismissal of appeal for default in giving security—Security given after time—Power of Court to extend time—Code of Civil Procedure (Act XIV of 1882) s. 549—Proportionate costs.

The suit was for damages against defendants for having trespassed and cut fuel on lands leased to plaintiff. Defendant No. 1 was agent of the owners of the lands and as such had leased first to defendant No. 3 and then, on default by the latter of payment of his rent, to the plaintiff. Defendant No. 2 was a fuel contractor into whose possession some fuel from the lands in question had passed through his sub-contractor defendant No. 3. Defendant No. 3 had after default and forfeiture cut fuel on the lands.

The suit was dismissed as against defendant No. 1, he being only an agent and having done all he contracted to do: also as against defendant No. 2, it not being shown that he had done any of the acts charged but had merely made an agreement with defendant No. 3 for the supply of fuel. A decree was passed against defendant No. 3 for part of the claim and the plaintiff was ordered to pay costs on the balance to this defendant.

On appeal to the Chief Court by defendant No. 3, security for costs was ordered; but was not given by the appellant until a week after the date fixed, when he signed a bond before the Munsiff.

A cross-objection as to costs was filed by the plaintiff, but although he knew previously that security had been taken after time,

* Appeal No. 374 of 1891 against original decree No. 234 of 1891 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 26th day of August 1891.

(1) 10 M. L. R., 229.

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he raised no objection until the appeal came on for hearing when he moved its rejection under sec. 549 of the Code of Civil Procedure.

Held per THUMBOO CHETTY, C. J.—that the conduct of the respondent amounted to a waiver and that the appeal should be heard.

Per KRISHNA MURTI, J.—the appeal must be rejected under sec. 549 of the Code of Civil Procedure.

Held, on reference, by the FULL BENCH, (THUMBOO CHETTY, C. J., RAMACHENDRA IYER and KRISHNA MURTI, JJ.) that the appeal should be heard, as the Court has power to extend the time and its order was substantially complied with.

Per THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.—Security having been already taken it would be an idle formality to take a fresh bond. The security already furnished should be accepted.

Per KRISHNA MURTI, J.—I still entertain doubts as to the validity of the moochalika taken by the Munsiff after expiry of the time fixed; and consider it advisable to renew the security in proper form.

Held, on the merits, by the DIVISION BENCH (THUMBOO CHETTY, C. J., and KRISHNA MURTI, J.) that the Munsiff's findings of fact are correct and that the appellant having failed to make out his case, it should be and was rightly dismissed.

Further, the Munsiff has not erred in his apportionment of costs, which is in accordance with the result of the suit. The plaintiff does not take exception to the amount of damages awarded and it follows that he had no justification in valuing the relief at an unnecessary large sum.

This was a suit to recover damages under the following circumstances. Defendant No. 3 had taken from defendant No. 1 a lease of some jungle-land for the purpose of cutting fuel thereon. In this, defendant No. 1 acted as agent and representative of the Vrittidars of the Inam villages to which the lands were attached. There was a condition in the lease that if the lessee defaulted in payment of the rent, the fuel of the jungle might be leased to anyone else irrespective of his rights with power to the lessor to re-enter. Before the expiration of this term defendant No. 3 made another lease in renewal or continuation of the first one for a further term of three

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years from the date of expiration of the original lease: and it was therein stipulated that in default of punctual payment of the rent, the fuel, subject of the lease, might be granted to others without regard to the rights of the lessee.

On this it was held by the Munsiff that defendant No. 1 was entitled on default by defendant No. 3 to determine the lease by re-entry and to make a grant of the fuel to others than defendant No. 3.

On the 14th January 1891 defendant No. 3, being then in default, though the term of his renewed lease was unexpired, the fuel right was put up to auction by defendant No. 1 and purchased by the plaintiff, who executed an agreement in writing to defendant No. 1 and was by him put in possession of the lands leased.

Defendant No. 2 was a fuel contractor and had made an agreement with defendant No. 3 under date January 8th, 1891, when that defendant was actually in possession of the lands and capable of taking fuel therefrom, to supply him with fuel. It was further found as a fact that defendant No. 2 had not visited the jungles and was not concerned as to where his contractors, including defendant No. 3, obtained the fuel they supplied to him.

The plaint charged that defendants Nos. 2 and 3 had, in collusion with defendant No. 1, entered on the land and cut and removed fuel therefrom during the pendency of the plaintiff's lease thereby causing him the loss and damage sued for.

The Munsiff held that defendant No. 1 had done for the plaintiff all he was bound to do under his agreement and had put him in possession of the land.

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The suit against defendants Nos. 1 and 2 was therefore dismissed.

It was found that defendant No. 3 had defaulted and thereby forfeited his rights under his lease; but had yet cut and removed fuel from the lands without permission or payment. A decree was therefore passed against him for Rs. 400 and the plaintiff was ordered to pay him costs on the balance disallowed.

Defendant No. 3 appealed against this decree and a cross-objection was subsequently filed by the plaintiff against the order that he should pay costs to defendant No. 3 on Rs. 257-8-0 the amount of the claim disallowed.

On the application of the respondent, the Chief Court made an order, on the 30th March 1892, that the appellant should give security for costs to the satisfaction of the Munsiff on or before the 13th April 1892. The respondent's cross-objection had been presented on the 21st and admitted on the 24th March 1892.

Security was not given on the 13th April 1892 for reasons explained by the appellant, but on the 21st April a bond was taken from him by the Munsiff.

The appeal, originally posted for the 1st April 1892 was adjourned to the 4th May 1892 for hearing, on which date the respondent for the first time moved the court to dismiss the appeal under the Code of Civil Procedure s. 549.

Mr. *S. Narayana Rao* for the appellant.

Mr. *Bhima Rao* for respondent No. 1.

Mr. *Nunjundappa* for respondent No. 2.

The following judgments on the preliminary ques-

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tion as to whether the appeal should be heard or dismissed under the Code of Civil Procedure s. 549 were delivered by the Chief Court:—

KRISHNA MURTI, J.—On an application made by the respondent the appellant in this case was ordered to furnish security for the costs of the respondent in this court and in the court below to the satisfaction of the Bangalore Munsiff on or before the 13th April for Rs. 120.

As a matter of fact the required security was not furnished till the 21st idem and the respondent now moves the court under s. 549 of the Code of Civil Procedure to reject the appeal.

The appellant says that he appeared in the Munsiff's court on the 12th April but that he could not speak to the Munsiff and that on the following day the Munshi advised him to come when the court re-opened on the 20th after the holidays. Even on this day security was not furnished and the moochalika bears date the 21st idem. The Munsiff explains that he accepted the moochalika in the belief that it was within time, which explanation does not help the appellant. It was his clear duty to furnish the security within the given time and on default this court has no alternative but to dismiss the appeal. It is an imperative duty cast upon the court itself. See *Haidri Bai* v. *The East Indian Railway Company*(1), *Shajuddin* v. *Krishna*(2) and *Budri Narain* v. *Sheo Koer*(3). No application on the part of any party seems necessary

(1) I. L. R. 1 All., 687. (2) I. L. R. 11 Mad., 190.

(3) I. L. R. 11 Cal., 716.

S. C. On appeal before the Privy Council is reported at I. L. R. 17 Cal., 512 and overrules I. L. R. 1 All., 687.

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as a condition precedent to remind the court of this imperative duty. In *Thakur Dass* v. *Kishori Lal*(1) the Allahabad High Court, consisting of Justices Oldfield and Broadhurst, refused to reject an application under this section on the ground that the order passed requiring the security was not a legal order as no ascertained amount of security was mentioned. But Oldfield, J. also added that the respondent should have obtained an order for rejection of the appeal from the court that gave the order to furnish security and that an application for such an order should have been made before the date of the hearing of the appeal. I am not quite convinced of the correctness of this order. For in the order requiring security time was given to lodge the security till the hearing, so that it had to be accepted even if tendered just before the hearing. There is nothing in the Code limiting the rejection of the appeal to the court which passed the order for security. In the face of the clear rulings of the cases already quoted it is difficult to follow this ruling which does not commend itself to me. The question of waiver was not set up or pleaded by the appellant; but I have thought over it. This question was one for the consideration of the Bench which required the security and not for the Bench which has to deal with the appeal under s. 549. The dates are important in this case and have a material bearing. If properly considered they seem to show that the question of waiver does not arise; at all events not at this stage of the case.

The appeal was filed on the 16th December 1891, and was posted to be heard on the 1st April 1892.

(1) I. L. R. 9 All., 164.

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The notice of appeal is said to have been served on the respondent on the 31st January 1892 when this court was closed for the long vacation. It was not opened for work before Monday the 7th March 1892, when the Judges returned from Mysore after H. H. the Maharaja's birth-day. On the 11th of March the respondent presented the application to take security from the appellant. After notice to the opposite side this application was brought on for hearing on the 23rd idem and the order requiring the security was pronounced on the 30th.

In the meanwhile the hearing of the appeal itself had been fixed for the 1st of April and under s. 561 of the Code of Civil Procedure as in force in Mysore any objection to the decree by the respondent must be filed seven days before such hearing. Not knowing the result of his application for security and not wishing to be shut out from filing his objection, the respondent used reasonable care and prudence and presented his objection on the 21st March; it was admitted on the 24th idem. When the order for security was passed on the 30th March the hearing of the appeal was on that day further adjourned.

Such being the facts of the case, I fail to see any evidence of waiver in the fact that the objection statement was filed so as to be within the time fixed by law nor can I see any deviation from the correct procedure when the respondent waited for the appeal to come on before the court and moved its rejection on the first opportunity thus occurring. I cannot find fault with the respondent for filing his objection statement within the time required

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by law, in other words for doing what he is required by law to do. Nor can I call upon him to explain why he did not do what he was not required by law to do, that is to say, file an application to move the rejection of the appeal before it came on for disposal. Section 549 requires that the security required should be given within the time fixed and when the duty of the court has been plainly and unambiguously laid down by the Code, I can neither ignore the words limiting the time nor pause to enquire what was done after such period had expired. There may be some hardship but I cannot ignore the binding provisions of the law so as to remove such apparent hardship, which was of the appellant's own creation. I have felt the inconvenience of discussing a point not raised or argued by counsel, but I have made these remarks as the learned Chief Judge has raised the question of waiver.

I have no alternative but to pass an order under s. 549 of the Code of Civil Procedure and I would accordingly reject this appeal with costs.

THUMBOO CHETTY, C. J.—I regret I am unable to agree to the order proposed by my colleague.

The three cases quoted are distinguishable from the present case.

In all those cases the security for costs was apparently not at all furnished either within the time allowed or before the appeals came on for hearing. In this case the appellant was required to furnish the security on or before the 13th April 1892. For reasons explained in his affidavit he furnished it on the 21st idem, and it appears from the statement made by the respondent's advocate, Mr. *Bhima Rao*,

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that when he was questioned on the previous day as to whether a moochalika might be taken from the surety produced by the appellant, he said he did not know the man, but left the court after mentioning to the Munsiff that the amount of security was fixed at Rs. 120. No objection was then taken to the Munsiff taking the moochalika after the expiration of the time fixed by the Chief Court. It may here be noted that the respondent filed a cross-objection under s. 561 of the Civil Procedure Code, on the 21st March; this was admitted on the 24th idem and posted for hearing to the 1st April 1892. The hearing of the appeal and the objection were subsequently adjourned to the 4th May 1892, when for the first time, respondent No. 1 moved the court to dismiss the appeal under s. 549, on the ground that the security was not furnished within the time allowed by this court. As explained by Oldfield, J., in *Thakur Dass* v. *Kishori Lal*(1), the object of requiring an appellant to furnish security before the hearing is to enable the respondent to desist from incurring costs unnecessarily if the appellant fails to give the required security within the prescribed time. If the appellant makes default in complying with the order for security the respondent should apply at once to the court for an order for rejection of the appeal and thereby protect himself from incurring any costs in connection with the appeal. But where, as in this case, the respondent, having learnt that the security was furnished after the expiration of the prescribed time, allowed the appeal to stand on the file and was himself anxious

(1) I. L. R. 9 All., 164.

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that his cross-objection should be heard along with the appeal, his conduct amounts to a waiver of his right to avail himself of the provisions of s. 549. In *Wise* v. *Jugbundoo Bose*(1) it was held by their Lordships of the Privy Council that the filing of the respondent's answer to the appeal before objecting to the want of security for costs, operated as a waiver and that, on general principles of law, the default on the part of the appellant ought to have been held cured by the respondent passing over it and filing his answer. Although in this case the cross-objection was filed before the order for security was passed, yet as the respondent's advocate made no objection to the Munsiff taking the moochalika for security after the expiration of the time fixed and remained quiet till the appeal came on for hearing, I hold that the respondent has, by his conduct, waived his right and that he cannot be permitted to ask for the rejection of the appeal. The law ceases with the reason for it. The appellant was required to furnish security to enable the respondent to recover his costs easily should the appeal fail. This object has been gained. The security has been furnished after the respondent's advocate was consulted and the respondent has not since withdrawn his cross-objection, in which he asks the court to consider his objections and to grant him the relief which he failed to obtain from the lower court. Under these circumstances it would be a denial of justice to reject the appeal on the technical objection put forward by the respondent.

I would hear both the appeal and the respondent's objection and dispose of them on the merits.

(1) 7 Moo. I. A., 431.

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THUMBOO CHETTY, C. J.—Since writing the above judgment the respondent's advocate referred the court to the reported decisions of *Ahmed bin Shaik Essa Kaliffa* v. *Shaik Essa bin Kaliffa*(1) *Rajab Ali* v. *Amir Hossein and others*(2) *Badri Narain* v. *Sheo Koer*(3) and *Modhusudan Das* v. *Adhikari Prapanna and another*(4). It seems to me that these decisions are more favourable to the appellant than to the respondent. In all these cases it was held by their Lordships of the Privy Council that where the security furnished was insufficient or the appellant failed to give security within the time fixed, the time may be enlarged on application made as well after as before the time fixed has expired. The decisions also show that the courts ought not to exercise the discretion vested by s. 549 arbitrarily and that, on reasonable grounds being shown, the time for furnishing the security may be enlarged.

In the present case the security was furnished before the appeal came on for hearing and there was no vexatious or wilful determination on the part of the appellant to disobey the order requiring him to furnish the security. I would condone the delay in furnishing the security, as the respondent has in no way been prejudiced thereby and he is himself anxious that his cross-objection should be heard, and I would proceed to hear the appeal and cross-objection.

KRISHNA MURTI, J.—In this last stage of the case it has received a further development. The ques-

(1) I. L. R. 13 Bom., 458.
(2) I. L. R. 17 Cal., 1.
(3) I. L. R. 17 Cal., 512, *overruling* I. L. R. 1 All., 687.
(4) I. L. R. 17 Cal., 516.

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tion is not now one of any application for the further extension of time granted by this court, but it is one of condoning the delay, for which neither in the Code itself nor in the numerous rulings quoted by the advocates can an express provision be found. The utmost which the Privy Council rulings have laid down is, that it is not necessary that an application for extension of time should be made before the time first granted has expired. This being conceded, their Lordships of the Judicial Committee still hold that the courts have to exercise judicial discretion before dealing with such applications. They have refused to interfere with the exercise of such discretion. But these rulings do not in their entirety apply to the case before us. By what has been admitted as a mistake or an oversight the security was accepted by the Munsiff after the time fixed therefor had expired. As pointed out by Mr. *Narayana Rao*, this case is, in this respect, distinguishable from all the others. At the same time the learned advocate could not deny that the authorities seem to be not quite in his favour. Admitting that we have the power to extend the time there is no such application before us. Taking a calm view of all the peculiar circumstances of this case I consider it of sufficient importance to be posted and argued before a Full Bench and I would under s. 15 (2) of the Chief Court Regulation propose a reference to the Full Bench of the question—

"Whether under the circumstances of this case and the provisions of s. 549 of the Code of Civil Procedure the appeal ought to be rejected or heard?"

Pending such reference I deem it unnecessary to

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express any opinion, although I may say that I am inclined to adhere to the opinion already expressed, as otherwise the result of the Munsiff's oversight or mistake practically deprives this court of an opportunity to exercise its judicial discretion, which would have become necessary had an application for extension of time been made to this court in due course. It is also a point to be considered whether the security taken after the time by the Munsiff is binding, as he had no authority to accept the moochalika after the date fixed by this court.

Referred to Full Bench.

A reference was then made on the point proposed by KRISHNA MURTI, J., and the following judgments were delivered by the Full Bench* :—

RAMACHENDRA IYER, J.—Upon the application of the respondent the appellant was ordered to furnish security for costs, before the Munsiff of Bangalore, on or before the 13th April 1892. The appellant alleges that he was present in court with his surety on the 13th April, expecting that the Munsiff would call him and order him to execute a bond. Nothing was done that day and the court was closed from the 14th April till the 20th. On the last mentioned day the appellant furnished security which was accepted by the Munsiff.

When the appeal came on for hearing, the respondent's advocate moved for its rejection on the ground that the appellant had not obeyed the order of the court. The appellant contended that he had not wilfully disobeyed the court's order, and that security

*Present—T. R. A. THUMBOO CHETTY, C.J., A. RAMACHENDRA IYER and KRISHNA MURTI, JJ.

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having been given the respondent could have no reasonable objection to the hearing of the appeal. He also made an oral application that if necessary the time for furnishing security might be extended by the court.

Whether on the 13th April 1892 the plaintiff made a *bonâ fide* mistake or a wilful default, it is manifest that the order made by the court has not been complied with. The point then for determination is, whether under the last clause of s. 549 of the Code of Civil Procedure we are compelled to reject the appeal or whether we have power to extend the time for giving security. The last clause of the section would seem to give us no discretion in the matter. It is upon this clause that the respondent has based his contention and he is supported by the decisions in *Haidri Bai* v. *The East Indian Railway Company*(1), *Shajuddin* v. *Krishna*(2) and *Badri Narain* v. *Sheo Koer*(3). The Judicial Committee of the Privy Council have however, put a different construction upon this section and have in fact over-ruled the abovementioned decisions. Their Lordships have held that "the application to the court to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered to be furnished, and the court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that they should do so." *Badri Narain* v. *Sheo Koer*(4). This being the opinion which the courts established in British India are

(1) I. L. R. 1 All., 687. (2) I. L. R. 11 Mad., 190.
(3) I. L. R. 11 Cal., 716. (4) I. L. R. 17 Cal., 514.

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bound to follow and there being no difference in this respect between the law which is in force in British India and the law in force in Mysore, I think we may unhesitatingly adopt the ruling. If after the expiry of the time originally fixed by us for furnishing security, we have power to grant an application for extension of time, the point for determination narrows itself to this, whether the oral application is sufficient and whether there are good and sufficient grounds for extending the time. The appellant says that he made a *boná fide* mistake and I see no reason for disbelieving him. The oral application may not be considered as sufficient. But if a written application is made I would extend the time. The effect of the order would be to compel the appellant to furnish fresh security. As however, security has already been furnished to the satisfaction of the Munsiff, I think it an idle formality to call upon the appellant to make his surety execute a fresh bond. The order originally made by us having been substantially complied with and the respondent being now assured of his costs, I think we need not go through an idle ceremony and that the appeal may be set down for hearing.

KRISHNA MURTI, J.—Under the peculiar circumstances of this case and after much careful thought I have come to the conclusion that I ought not to object to hear this appeal. But I should be sorry if it should be drawn into a precedent. When it was within the power of the court to fix the time within which it could require its order to be complied with, I did not doubt its competency to extend it, and if an application had been made to that effect I should

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have considered it, and probably have granted it having regard to the mistake made by the Munsiff in accepting the security after the lapse of the fixed time. There was no allusion to this request in the course of argument on the first occasion when the rejection of the appeal was first moved. On the second occasion, Mr. *Narayana Rao* possibly mentioned it as a means of escape from the difficulty and I directed my remarks to that purpose. After the question has been again argued before the Full Bench I have considered this point with special reference to the mistake into which the appellant was led by the error of the Munsiff and have resolved to give effect to it as an application duly made for extending the time originally fixed.

I still entertain doubts as to the validity of the moochalika taken by the Munsiff after the expiry of the time fixed by this court. The question is relevant so far as we are required to see that in the interest of the respondent the security furnished is valid and binding. To prevent the possibility of any dispute arising in this matter it is advisable to renew the security in the proper form. The question though it has not arisen for decision in this case is yet important, as if there is any doubt or uncertainty about it we shall not be justified in hearing the appeal on the acceptance of what may hereafter turn out an invalid security.

THUMBOO CHETTY, C. J.—I have nothing to add to what I have recorded before the reference was made to the Full Bench. I would accept the security already furnished and hear the appeal.

It having been thus decided that the appeal should

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be heard, the following judgment on the merits was delivered by the Division Bench (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J) :—

The appeal against respondent No. 2 is clearly untenable. He is no more than an agent and he acted professedly as such on behalf of the owners of the jodi land in question. He has not by his act rendered himself liable to any action by the appellant. On this ground alone the appeal against him must be dismissed. But we find also that the Munsiff was right in holding that there was no cause of action against him on the statement of facts made in the plaint. The plaintiff clearly alleges that he obtained possession of the forest and it is clear that, so far as respondent No. 2 was concerned, the performance of the contract on his part was complete. There is ample evidence on record to show that the plaintiff was quite aware of all the circumstances under which the lease of the forest was given to him. Knowing that the present appellant was the lessee before him, he accepted possession of the forest and there was no further liability of respondent No. 2 to be enforced in his favour.

Coming now to the real question involved in the case, *viz.*, whether the appellant had by his conduct forfeited the lease, we are of opinion that the Munsiff's finding is correct and must be accepted.

We cannot accede to the contention of the appellant's advocate that, even if there was a default in payment of the lease amount, respondent No. 2 was not entitled to determine the lease, but only to sue for rent. The terms of the contract are very clear. It was pointed out to us that there was an error in

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the translation, but the original itself is very clearly worded. We can only understand the phrase "Oojoor Idade" (*a*) as meaning that the lessor reserved to himself the right of determining the lease on default without any reference to the lessee. The necessity of a preliminary notice giving intimation of the default is thus dispensed with and we have no hesitation in holding that, if there has been a default, respondent No. 2 acted within his rights in determining the lease and renting it to the plaintiff.

The Munsiff has decided the question of default correctly. Here again, we must remark that it is altogether immaterial whether respondent No. 2 has mentioned the real cause of default in the plaintiff's lease. So long as there is a default, antecedent to the lease of the plaintiff, we are of opinion that the appellant's lease was forfeited. The Munsiff has shewn correctly that fifty rupees, which were due for the year 1890, were not paid at all. According to the appellant's allegation, he tendered it before a panchayet, but none of these panchayetdars were examined by him. The money due for the year was payable in two instalments, but the lease to the plaintiff was not finally executed till January 1881. Moreover, even according to the plaintiff himself, he did not pay twenty-five rupees on account of pasturage and there is no evidence on record to show that there was any valid dispute between the parties to warrant the appellant's withholding of this money.

On the whole, we are of opinion that the appel-

(*a*) ವುಜೂರು ಯಿಡದೆ

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lant has not made out his case and his appeal must be dismissed with costs.

Respondent No. 1, who is the original plaintiff, has filed an objection under s. 561 of the Code of Civil Procedure.

We have already shewn that, as against respondent No. 2, neither the plaintiff nor the appellant has a cause of action. The direction of the Munsiff about his costs is quite correct and is confirmed.

We do not think that the Munsiff has erred in directing the plaintiff to pay the costs of defendant No. 3 on the amount disallowed. Respondent No. 1 does not take exception to the amount of damages awarded and it follows that he had no justification in valuing the relief at an unnecessarily large sum. The taxation of costs is in accordance with the result of the suit and we see no reason to interfere with it.

The objection also is disallowed.

Appeal and cross-appeal dismissed. Costs against appellant.

Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

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VENKAPPAIYA AND 4 OTHERS (DEFENDANTS) *v.* VISVESVARAIYA AND 2 OTHERS (PLAINTIFFS).*

Documentary evidence preferable to oral testimony—Hindu Law—Power of father to bind joint family property—Liability of son to pay father's debts—Costs.

Held, that where a letter admitted by the plaintiff is inconsistent with the oral testimony adduced by him and no explanation of such inconsistency is offered, the document is to be accepted in preference to the oral evidence.

* Appeal No. 240 of 1892 against original decree No. 5 of 1891 of Mr. C. Cress, District Judge of Nagar, dated the 30th May 1892.

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Also, that a father cannot under Hindu law bind the person of his son by a contract, though he may bind the joint family property. A decree against the sons as well as the father is therefore incorrect, as a son is not liable to pay his father's debts if he has not inherited any property from him; and his liability in any case is limited to the value of the property inherited by him.

The decree against the sons personally was therefore set aside but there being nothing to rebut the plaintiff's case that the debts were contracted for the benefit of the family, the whole of the family property was made liable for the debt.

The appellants, having substantially succeeded, were allowed costs in appeal on the amount decreed: but to pay costs on the same amount in the lower court.

The plaintiff sued father and sons on a balance of account with the former and obtained a decree for Rs. 6,000.

The defendants appealed to the Chief Court.

Mr. *S. Narayana Rao* for the appellants.

Mr. *B. Nunjundappa* for the respondents.

The facts of the case appear sufficiently for the purposes of this report in the judgment of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) which was as follows :—

The plaintiff alleged that his father and brother had dealings with defendant No. 1 and his father from 1868 to 1885, that that defendant settled accounts in Sravana of Sarvajithu and acknowledged his liability to pay Rs. 2,251-15-6; that there were other dealings and transactions between them from 1885 till 1888, on which the defendant was indebted in the sum of Rs. 7,396-0-8; and that the defendant paid Rs. 5,300 odd only towards the discharge of these debts. The suit was brought for the remainder which was said to amount to Rs. 6,719-0-5. The

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sons of this defendant were made parties to the suit and a decree was prayed against them also, on the ground that the father was the manager of the family and that the transactions were for the benefit of the family.

Defendant No. 1 denied the alleged settlement of accounts, admitted his liability in respect of the other dealings referred to in the plaint, and stated that he was prepared to pay what was due after deducting from the debt the value of areca nut which he had supplied to the plaintiff.

The District Judge found that the settlement of accounts alleged to have been made in Sarvajithu was true, and that the amount which was due by the defendants was Rs. 6,000. He made a decree for this amount against all the defendants. They have appealed from the decree, and their first ground of appeal is, that there was no settlement of accounts at all in Sarvajithu.

It would appear from the evidence of the plaintiff and of his gomasta Mahabalaya, that this gomasta and the defendant's gomasta examined and checked the accounts for about fifteen days, that defendant No. 1 acknowledged his indebtedness in his own handwriting on the 10th M. D. of Sravana in Sarvajithu and that on that day and on the preceding day the defendant was in the plaintiff's house. On the other hand, there is the letter marked as Ex. No. 1, the genuineness of which was admitted by the plaintiff. It would appear from this document, which was dated the 9th M. D. of Sravana, that defendant No. 1 had written to the plaintiff's brother for a bandy to go to Shimoga, and that the brother wrote

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to the defendant informing him of the arrangements made for his journey. This letter being *primâ facie* inconsistent with the oral evidence adduced by the plaintiff, and there being no explanation of this inconsistency, we are inclined to prefer the document to the oral evidence and to hold that the evidence on record is insufficient to prove the alleged settlement of accounts. Our finding on this question of fact being adverse to the plaintiff, there is no need to discuss the question of limitation, which was argued by the advocates.

The correctness of the other findings not being questioned, the account between the parties stands as follows:—

Principal..................	Rs.	7,396	0	8
Interest claimed in the plaint......................	„	2,458	11	7
	Rs.	9,854	12	3
Payments admitted by the plaintiff in the plaint..	„	4,980	6	10
Other payments according to the judge's finding..	„	715	0	0
Counter interest upon these items from the last date of payment, *i.e.*, September 1888...	„	1,653	0	0
	Rs.	7,348	6	10
The remainder is..........	Rs.	2,506	0	0

omitting annas and pies.

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The plaintiff will have a decree for this amount only, with interest at 12 per cent. from the date of suit till date of decree, and interest at 6 per cent. upon the aggregate amount from the date of decree till the date of payment. He will recover costs upon this amount only in the lower court.

Whether the District Judge was right in making the sons personally liable for the debt is the only point is left for determination. The strict letter of the Hindu law may justify the decree which the District Judge has made. But this Court has ruled, following the decisions of the High Courts of Madras and Calcutta, that although a father may, in certain cases, bind the joint family property by his contract, yet he has no right to bind the persons of his sons, that a son is not liable to pay his father's debts if he has not inherited any property from him, and that his liability is limited by the value of the property inherited by him. Following these rulings, we hold that the judge ought not to have made a decree against the sons personally. As there was nothing to rebut the plaintiff's case that the debts were contracted for the benefit of the family, we hold that the plaintiff may hold the whole of the family property liable for the debt.

As the appellants have substantially succeeded in this court, we direct the respondents to pay the appellants' costs upon the amount allowed by this decree.

Decree modified. Costs to appellant.

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Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1892 December 2.

R. VENKATA ROW (DEFENDANT No. 1) *v.* THE BANGALORE PETTA MERCHANTS BANK (PLAINTIFFS).*

Code of Civil Procedure (Act XIV of 1882) ss. 549 and 592—Pauper appellant—Security for costs—Duty of court admitting appeal—Reasonable time for defence—Negligence—Misconduct—Civil liability of agent for acts of subordinate—Limitation—Limitation Act (XV of 1877) Sch. II, Art. 90.

A bank agent, having been convicted of criminal breach of trust was sued by the directors for the monies he had misappropriated, and a decree passed against him. He appealed and was held to be a pauper. He urged that the lower court failed to give due consideration to the fact of his imprisonment and consequent inability to produce evidence by the date of hearing, which was fixed unreasonably early, that the suit was barred by limitation and that he ought not to be held liable for several items many of which he alleged (but did not prove) were misappropriated by his subordinates.

Application was made by the respondents that security for costs should be taken from the appellants, in answer to which he urged his poverty and that to demand security would in fact deny him the right of appeal.

Held, that under the circumstances security for costs should not be taken, and that the case should be remanded to the District Court to hear the appellant's objections to the accounts found against him.

Further, that the limitation applicable is that provided by the Limitation Act (XV of 1877) Sch. II, Art. 90, namely three years from the time when the neglect or misconduct becomes known to the plaintiff, and the suit is therefore not barred.

Also, there is absolutely no evidence that any particular sums were made away with by others and it was the defendant's duty to see that the accounts were correct and to sign the daily cash balances; the defendant is therefore civilly responsible to the bank for sums misappropriated by him or by other officials through his negligence.

Per KRISHNA MURTI, J.—As the appeal was made in *formâ pau-*

* Appeal No. 183 of 1892 against original decree No. 36 of 1890 of Mr. T. Narahari Row, District Judge of Nundidroog, dated the 4th day of December 1891.

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peris, it was incumbent on the court to satisfy itself before admitting the appeal, that the decree appealed against was erroneous or unjust.

The judge would have acted in furtherance of justice, if instead of giving the defendant's advocate the unreasonably short period of four days to consult his client and produce evidence he had given him reasonable time for the purpose.

The principles laid down by the High Courts of Madras and Bombay that the poverty of an appellant should be no ground for depriving him of the right to appeal, should guide the decision of this case as to security for costs.

A decree having been given by the District Court for monies claimed by the plaintiff bank as misappropriated by the defendant while acting as their agent, he was allowed by the Chief Court to appeal as a pauper and a preliminary question arose as to whether he should be called upon to give security for costs under s. 549 of the Code of Civil Procedure.

Mr. *B. Srinivasa Iyengar* for the appellant.

Mr. *Vencataramayya* for the respondent.

The following judgments were passed by the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTHI, J.) on the preliminary questions :—

KRISHNA MURTI, J.—The only objection taken in this appeal was, that the lower court did not give due consideration to the fact that the appellant was a prisoner undergoing imprisonment in the Central Jail and to the consequent disadvantages he was labouring under for producing his evidence before the court within the fixed time. As the appeal was made in *formâ pauperis*, it was incumbent upon this court, under s. 592 of the Code of Civil Procedure, to satisfy itself, before admitting the appeal, that the decree appealed against was erroneous or unjust. I had the honor of being a member

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of the Bench which admitted the appeal and we did so, because we thought that the representation of the appellant was well founded. Considering the number of adjournments which have been allowed in this case, the judge would certainly have acted in furtherance of justice if, instead of giving the defendant's advocate the unreasonably short period of four days to consult with his client and produce the available evidence, he had given him reasonable time for the purpose. The judge does not seem to have considered the objections of defendant No. 1 at all. It is this omission which is deemed prejudicial to him and to repair which he has been deemed entitled to appeal.

On the day of the hearing, the respondent's advocate made an informal application to take security from the appellant for the costs of the suit and the appeal. The appellant has expressed himself unable to give the required security. He is a proved pauper and the property which he had is under attachment to satisfy any decree that may be ultimately passed against him in the case. The alienations which the appellant attempted to make have been set aside and there is no appeal against that part of the decree. The question under the circumstances is, whether the appellant ought to be required to give security which will, doubtless, have the effect of denying him the right of appeal. The balance of reasons seems to be against such a direction. The appeal in this case has been made in good faith and upon proper grounds. All the property which the appellant has, has been taken charge of by the court. The justness of the decree appealed against is *primâ*

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facie open to objection. Poverty should not alone be the means of depriving a man of his lawful remedies. It is the appellant's poverty, coupled with his incarceration in the jail, which places him at a peculiar disadvantage. In the case of *Nusseerooddeen Biswas* v. *Ujjul Biswas and others*(1), Couch, C. J. and Dwarkanath Mitter, J. held that the corresponding provision of Act VIII of 1859 did not apply to a pauper appellant. This ruling was not followed by Chief Justice Turner and Justice Muttusami in the more recent case of *Seshayyangar* v. *Jainulavadin*(2), but the learned judges laid down the rule in the following words :—

"But seeing that a suitor should not be allowed to appeal in *formâ pauperis* unless there is *primâ facie* ground for believing that there are substantial grounds of appeal, and that it would ordinarily defeat the intention of the law if a pauper were called on to find security, we hold that very special grounds should be shown to induce the court to call on him to find security."

In *Maneckji Limji Mancherji* v. *Gool Bai*(3) the Bombay High Court declined to make the order for security, on the ground that the poverty of the defendant should be no ground for depriving him of the right to appeal.

The principles thus laid down must guide the decision of this case, and judged by them, the respondent's application appears unreasonable and must be rejected.

To turn now to the substantial prayer made by the

(1) 17 W. R., 68. (2) I. L. R. 3 Mad., 66.
(3) I. L. R., 3 Bom., 241.

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appellant, it seems right that the case should be sent back to the lower court, with directions to take such evidence as may bear upon the objections filed by the appellant and may be adduced by him, and to send the record and the additional evidence back to this court together with the judge's findings on them, within two months from the date of the receipt of this order. Objections to such findings, if any, will be taken within the time prescribed by the rules of this court.

THUMBOO CHETTY, C. J.—As my learned colleague proposes only to remand the case for additional evidence to be taken upon the objections preferred to the Commissioner's report and that the proceedings be resubmitted to this court for final disposal of the appeal, I see no necessity for requiring the appellant to give security.

I agree to the order proposed on the other point raised.

As to whether there were *primâ facie* grounds for admitting the appeal in *formâ pauperis* or not, I deem it unnecessary to state my opinion, as a Division Bench has already admitted the appeal.

Case remanded.

1893 *April* 14.

On return of the record by the District Court, the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) passed the following judgment on the merits:—

The appellant Venkata Row was the agent of the Petta Merchants Bank in Bangalore. As he failed to account for certain sums received by him, he was proceeded against criminally and convicted and punished for breach of trust, in Sessions Case No. 25

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of 1889 on the file of this court. On inspection of the accounts of the bank in August 1888, it was found that, owing to the negligence and fraud of appellant, the bank sustained a loss of Rs. 4,231-12-5, for which this suit was brought.

Upon examination of accounts by a Commissioner appointed by the District Court, a decree was passed against the appellant for Rs. 4,106-7-2, with further interest and costs.

The defendant, Venkata Row, appealed on the grounds set forth in his petition dated the 1st January 1892. The suit was remanded to the District Judge for additional evidence to be taken upon objections preferred by the defendant to the Commissioner's report.

The District Judge has now submitted the evidence so taken with his findings on the several objections. The appeal was reheard on the 10th instant.

The advocate for the appellant contended that the present claim was barred by limitation, as the transactions for which the defendant has been called upon to account took place more than three years prior to the institution of the suit. This contention is untenable. This is an action founded on negligence and misconduct imputed to the defendant as agent of the bank, falling under article 90, first schedule of the Limitation Act. The time from which the prescribed period of limitation (three years) begins to run is, when the neglect or misconduct became known to the plaintiffs. The defendant was the agent of the bank from the 1st January 1876 to the 22nd September 1888. It was in August 1888 it was found, on in-

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spection of the accounts, that there was misappropriation by the defendant. The suit was filed in September 1889. It is therefore within time.

Another contention put forward by the defendant was, that he alone was not responsible for the cash and accounts of the bank, that there was a deputy agent and accountant who also transacted business with him and that in the absence of a *katcha kard* or rough day-book, he was unable to account satisfactorily for some of the items charged against him. The accounts relating to all the transactions specified in the plaint schedule are signed by the defendant. It may be that he was assisted by a deputy agent or accountant in carrying on the business; but there is absolutely no evidence that the particular sums found by the Commissioner to have been misappropriated by the defendant were made away with by the deputy agent or accountant. As the agent of the bank, who signed the daily cash balances, it was appellant's duty to see that the accounts were kept correctly and that the cash on hand tallied with the balances shewn in the accounts. He was civilly responsible to the bank for sums misappropriated by him, or by the other officials through his negligence. With regard to the *katcha kard* or rough day-book, it appears from the defendant's own examination that, when he obtained a receipt from the Inspector for all the books and accounts of the bank handed over to the Inspector, the *katcha kard* was not forthcoming and was not included in the receipt. If so, the defendant himself is responsible for its disappearance, and its non-production cannot exonerate him from liability.

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[The Court then discussed the appellants liability as to several items included in the decree of the lower court and as to which specific objection had been taken and, for reasons recorded, found the appellant not liable for some of them.]

We therefore deduct the items referred to above aggregating Rs. 1,713-3-6 and adjudge the defendant to pay the balance Rs. 2,393-3-8 to the plaintiff bank, together with further interest on the sum decreed from date of suit to date of liquidation, at 6 per cent. per annum.

Decree modified.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1892 *December* 2.

DODDA VENKATIGA AND 3 OTHERS (DEFENDANTS) *v.* B. VENKATIGA AND 2 OTHERS (PLAINTIFF).*

Jurisdiction of Civil Courts—Code of Civil Procedure (Act XIV of 1882) s. 11—Survey Settlement, effect of.

Held that a suit by Talaris, for an injunction to restrain the defendants from interfering with their enjoyment of the produce of certain tamarind trees is not prohibited by the Land Revenue Code or Rules, but is cognisable by a Civil Court under *s.* 11 of the Code of Civil Procedure.

Held also, that, although the defendants are co-sharers of the Talari *huq* and in possession of a portion of the *inam* land, yet such portion having been distinct and with a distinct number before the Survey Settlement, that settlement did not give rise to any new rights or obligations not previously existing and did not make common property of everything within the boundaries of the new number. The right claimed by the plaintiffs having been proved to have existed in them exclusively they are entitled to the injunction sought for.

The plaintiffs were before the Survey Settlement in exclusive possession of a piece of land on which

* Appeal No. 35 of 1892 against original decree No. 991 of 1890 of Mr. B. Basavaradhya, Munsiff of Chickballapur, dated the 6th day of November 1891.

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grew a tope of tamarind trees and the defendants had an adjacent piece, separated from that of the plaintiffs by a canal. At the Settlement these two pieces of land were united under one Number and the defendants therefore claimed a joint property with the plaintiffs in the tamarind trees. The plaintiffs sued for a perpetual injunction and damages, and obtained a decree, against which the defendants appealed.

Mr. *Nunjundappa* for the appellants.

Mr. *S. Ramaswamy Iyengar* for the respondents.

The judgment of the Chief Court (THUMBOO CHETTY, C. J. and Krishna Murti, J.) was as follows :—

In the appreciation of evidence, we are of opinion that the Munsiff has not erred and we uphold his finding that the land and tamarind trees in dispute standing thereon were in the possession and enjoyment of the plaintiffs.

Though the defendants also are sharers of the Talari *huq* and as such in possession of a portion of the inam land, yet such portion was distinct and before the Survey Settlement bore a distinct number. The trees in dispute were not situated in such portion. The cause of this dispute seem to have arisen from the fact that during the Survey Settlement, all these separate pieces were clubbed into one number; and the parties were led to believe that the trees standing in any portion of this new number became their common property. This belief is erroneous and does not give rise to any new rights or obligations which did not exist before the Survey Settlement. The plaintiffs' 1st witness, who is defendant No. 1, is

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more than 60 years of age and "the tamarind trees yield fruits ever since he came to know of them." Nevertheless he and his partners have been enjoying them only for the last five or six years. The plaintiffs' 2nd witness knows that the fathers of plaintiffs Nos. 2 and 3 owned the tamarind trees in dispute. According to their 4th witness "the disputed tamarind trees belong to the plaintiffs who enjoyed the produce all along." The 5th witness states that the tamarind trees are the plaintiffs'. The evidence is thus quite clear and conclusive to prove the possession and the enjoyment of the trees by the plaintiffs.

This suit is laid for a perpetual injunction restraining the defendants from interfering with the plaintiffs' rights and enjoyment of the tamarind trees. No specific authority was quoted by the appellants' advocate which would operate as a bar to the civil courts taking cognizance of such suits. Section 221 of the Land Revenue Code does not contain any prohibition expressly applicable to this case. This is not a claim to perform the duties of a village hereditary office, or in respect of any injury caused by exclusion from such office. No order is sought to be set aside. Clause D of sub-section 5 of section XLIII of the Land Revenue Rules prohibits only such emoluments or any portion thereof from being made liable to attachment or other processes in satisfaction of judicial decrees. Para. 6 of the Commissioner's Notification of the 9th September 1835 refers only to claims to succession to, or to the possession of, hereditary village offices. In the absence of any express legal prohibition, civil courts are, under section 11 of the Code of Civil Procedure, bound to take cognizance of all

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suits of a civil nature; and there can be no dispute that the relief prayed for in this suit, *viz.*, the issue of an injunction not to interfere with the plaintiffs' enjoyment of their right, is one of a civil nature. We are of opinion for these reasons, that the objection taken to the jurisdiction of the court below to entertain this suit is without a legal basis and ought not to be allowed to prevail.

The judgment of this court in A. S. No. 106 of 1889, relied upon by the appellants, is not strictly applicable to this case. There the contention raised was that the trees formed part of the emoluments attached to the office of Patel and the plaintiffs claimed the same as belonging to them as Talaris. In this case, there is no question whatever as to the emoluments belonging to the Talaris, and it is the removal of interference with the enjoyment of such emoluments which is sought for in this case. As a question of fact, we have found that the plaintiffs have been enjoying them; and the relief which they claim, *viz.*, an injunction, which would enable them to enjoy them without any let or hindrance, is one that cannot be refused to them by a civil court.

Appeal dismissed with costs.

Before A. Ramachendra Iyer, Offg. Chief Judge and C. Meenacshaya, Offg. Judge.

RAMA CHENDRIA (DEFENDANT NO. 2) *v.* R. RANGAPPA (PLAINTIFF).*

1892 *Dec.* 19.

Registered Company—Liability of officers for money due by Company.

The plaintiff being entitled to receive money from a registered

*Appeal No. 257 of 1892 against original decree No. 626 of 1891 of Mr. H. Thimma Krishna Rao, Munsiff of Kolar, dated the 18th day of August 1892.

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Company sued the president and shroff, alleging that they had taken the amount and misappropriated it.

Held that the plaintiff had no cause of action against the defendants. He could only sue the Company. If the defendants had defrauded to Company, that was matter for settlement between it and them.

The Munsiff having given a decree against the president and shroff of a registered company personally for monies due by the company and said to have been misappropriated by the defendants, the latter appealed to the Chief Court.

Mr. *Narayana Rao* for the appellant.

Mr. *S. Subbaraya* for the respondent.

The judgment of the Chief Court (RAMACHENDRA IYER, Offg. C. J. and MEENACSHAYA, Offg. J.) was as follows:—

The plaintiff was entitled to receive a sum of money from a company which was duly registered under the Indian Companies Act. Instead of suing the company, the plaintiff claimed relief against its president and shroff. The cause of action alleged against the defendants was, that "the plaintiff had to get Rs. 53-5-4 as *sahayem*, which defendants Nos. 1 and 2 debited to the plaintiff in the company's C account, and misappropriated the same without paying it to the plaintiff, and that, when the plaintiff made a demand for the money, the defendants promised to pay it and ultimately failed to do so."

The Munsiff of Kolar gave a decree against defendant No. 2.

We are of opinion that the plaint does not disclose a good cause of action against both or either of the defendants. If money which was payable by the company was not paid by it, the plaintiff had his

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remedy against it. If a suit was brought against the company, it would be no defence to plead that two of its officers had been authorized to satisfy the claim. It may be that the company authorized the defendants to pay what was due to the plaintiff and it may be that they misappropriated the money which was left in their hands for satisfying his claim. If they did not do their duty or if they defrauded the company, that was a matter for settlement between them and the company and the plaintiff would not be affected by it.

The respondent's advocate argued that the shroff had bound himself to pay the plaintiff and that the suit was based upon a special contract. We do not agree in this contention, firstly, because the alleged special contract was not set out in the plaint, and secondly, the letter written by the plaintiff to the liquidator is inconsistent with it.

We reverse the decree and dismiss the suit with costs throughout.

Appeal allowed. Suit dismissed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

K. SUBBAYYA (PLAINTIFF) v. CHICK NUNJAPPA AND 3 OTHERS (DEFENDANT).*

1892 *July* 13.

Declaratory decree—Further relief—Specific Relief Act (I of 1877) s. 42—Multiplicity of suits—Cause of action.

Suit for declaration of right in a well and four cocoanut trees, of which the plaintiff claimed a one-sixth share only: and which were in the possession of the defendants.

Held, that actual partition being impossible the plaintiff could only ask for a declaration of his right, and not for further relief.

* Appeal No. 322 of 1891 against original decree No. 1060 of 1890 of Mr. B. Basavaradhya, Munsiff of Chickballapur, dated the 17th day of June 1891.

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The plaintiff should not be compelled to seek further relief for the purpose of avoiding multiplicity of suits, because he would have a fresh and independent cause of action whenever default might be made in payment or delivery, of produce on due date.

By a conveyance dated the 30th July 1885, the plaintiff obtained a one-sixth share in certain land annexed to which he claimed a right for irrigation purposes of using a well situated in that portion of the land in the possession of defendant No. 2 and also a similar share (one-sixth) in four cocoanut trees growing on the same land of the defendants but which defendant No. 2 claimed as his exclusive property.

The Munsiff dismissed the suit with costs on the ground that under s. 42 of the Specific Relief Act, the plaintiff ought to have sued for further relief and not for declaration of title merely. The material parts of his judgment are as follows:—

The defendants' pleader contends that the plaintiff is able to ask for further relief, namely, for possession of the property in dispute or for an injunction: the plaintiff's pleader submits that the plaintiff cannot sue for further relief because he has no further relief to ask and he has not asked for an injunction because he has no fear of the defendants annoying him again and again after his rights are embodied in a declaratory decree.

I agree with the plaintiff's pleader in so far as he contends that under the circumstances set forth in the plaint as well as in the pleadings the plaintiff cannot in the nature of things ask for any such relief as possession. But I think the present is a case in which an injunction might have rightly been asked for as relief; because the object of the proviso to s. 42 of the Specific Relief Act is to prevent multiplicity of suits, *i. e.*, that the plaintiff should not now sue for a declaratory decree and subsequently for an injunction to restrain the defendants from interfering with his rights. See *K. Muttanna* v. *M. Appaiya and another*(1).

I therefore hold that the plaintiff was able in the present case to ask for further relief and since he has not asked for it, he is not entitled to a declaratory decree under the proviso of *s.* 42 of the Specific Relief Act.

(1) 10 M. L. R., 382.

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The suit having been dismissed with costs on this ground, the plaintiff appealed to the Chief Court.

Messrs. *S. Ramaswamy Iyer* and *Jayarama Iyer* for the appellant.

Respondent No. 2 appeared in person, and for his Ward, respondent No. 4. The other respondents were absent.

The judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

We are of opinion that the grounds upon which the Munsiff dismissed the plaintiff's suit are untenable, that the suit was not improperly framed and that it is not bad on the ground that the plaintiff was entitled to ask for further relief and ought to have done so to prevent further litigation.

The Munsiff appears to have misunderstood the claim and the defence.

In the plaint it is distinctly asserted that the plaintiff was in possession of the land annexed to the one-sixth share conveyed to him under the plaint document dated the 30th July 1885. There is no question as to the plaintiff's right to this land. But what the plaintiff seeks to establish is his right to a well and to four cocoanut trees situate in that portion of the Survey number which is in the possession of defendant No. 2.

Defendant No. 2, who appeared in person before this court, stated that he had no objection to the plaintiff using the water of the well for irrigation of his (the plaintiff's) portion of the land. If the other defendants do not oppose the plaintiff's right to the well to the extent of his one-sixth share, there could be no objection to the plaintiff obtaining a decree as

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prayed for. The well being in that portion of the land in the possession of defendant No. 2, the plaintiff was obliged to sue to establish his right to one-sixth share in the well, as that was the only well which was the source of irrigation for his (plaintiff's) land.

With regard to the four cocoanut trees, defendant No. 2 contended before this court that they were on his land and belonged to him exclusively. This is a point for enquiry. It is impossible to divide the four trees into sixth shares, assuming that the plaintiff was entitled to one-sixth share. He sued, therefore, to establish his right to the one-sixth share and not for actual division or partition. He also sued for one-sixth share of the past produce, but withdrew this portion of the claim with liberty to bring a fresh suit. If he is entitled to one-sixth share in the trees as against the defendants and succeeds in getting a decree accordingly, defendant No. 2, on whose land the trees stand, will be bound to give over to the plaintiff a sixth share of the produce annually or periodically; and whenever default is made in the payment or delivery of the produce on due date, the plaintiff will have a fresh and independent cause of action. We fail to see what further relief he can claim at present in regard to the trees. The trees being admittedly on defendant No. 2's land, all that the plaintiff wants to establish is his right to one-sixth share in the trees. He has no objection to the trees remaining under the care and supervision of defendant No. 2, but as the latter denies the plaintiff's right to one-sixth share in them and refuses to give to the plaintiff the produce

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falling to the plaintiff's share, this suit has been brought for the establishment of the plaintiff's right. Further relief for recovery of produce or value falling to the plaintiff's share can only be obtained as the produce accrues due. In this view we hold that the suit was improperly dismissed.

We set aside the Munsiff's decree and direct him to restore the suit to his file and to dispose of it on the merits. Costs of this appeal will be costs in the cause and abide the fresh decision of the Munsiff.

Appeal allowed. Suit remanded for trial on the merits.

Before T. R. A. Thumboo Chetty, Chief Judge, and P. N. Krishna Murti, Judge.

SUBBIA (DEFENDANT NO. 4) v. BABUR MUNISAMY (PLAINTIFF).*

AND

CHENNAPPA (DEFENDANT NO. 5) v. BABUR MUNISAMY (PLAINTIFF).*

1892 June 20.

Minor—Guardian—Fraud—Collusion—Court-sale, setting aside—Limitation—Limitation Act (XV of 1877) Sch. II, Art. 12—Costs.

The plaintiff sued on the 17th January 1887 to recover property sold on the 26th October 1882 at execution sales confirmed on the 9th January 1883 and not set aside. He alleged that being then a minor he was not properly represented and the decree was therefore void; also that his mother, who assumed to represent him, was guilty of fraud and collusion.

Held, that the plaintiff's mother was his natural guardian and legally competent to represent him in court, which she did.

Also, that as against purchasers at court-sales who were utter strangers, any plea of fraud not as against themselves personally, could not avail the plaintiff. But as to the facts no fraud was proved, though there might have been carelessness.

* Appeals Nos. 307 and 342 of 1891 against original decree No. 893 of 1889 of Mr. P. S. Krishna Rao, Sub-Judge of Bangalore, dated the 25th day of July 1891.

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Also, that the proper procedure for advancing ground to set aside a decree is by way of review and not by separate action. *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*(1) approved: and no suit to set aside a sale after one year from its confirmation can be entertained, even though the decree in execution of which the sale had taken place had been reversed by the appellate court. *Parshadi Lal* v. *Muhammad Zain-ul Abdin*(2) followed.

Further, that there being no fraud, the limitation applicable is that prescribed by Sch. II, Art 12 of the Limitation Act, namely, one year from the date of confirmation of the execution sale; and that making all allowances for the plaintiff on account of his minority his suit is nevertheless barred; but as the objection of limitation was taken only at a late stage in the appellate court, each party there should bear his own costs and the plaintiff pay those of the defendants in the lower court only.

This was a suit brought to have the sale of certain property sold in execution of a decree declared void and to recover such properties. The facts were, that on the 3rd June 1878 defendant No. 2, professing to act as guardian of the plaintiff then a minor and of defendant No. 1, sold the village of Chinchugatta which belonged to the minor to defendant No. 3, Rama Rao, by deed of sale. In 1880 two persons named Galappa and Nagappa claiming to have certain shares in the said village brought a suit to have the sale of the village set aside in so far as their shares therein were concerned. Defendant No. 3 after contesting the suit up to a certain stage entered into a compromise and filed a *razinama* whereby he agreed to purchase the shares of the claimants which he afterwards actually did purchase under a deed for Rs. 2,000. Defendant No. 3 then called on defendants Nos. 1 and 2 to make good the loss he had sustained by reason of the litigation and got a deed of

(1) I. L. R. 12 .Cal., 69. (2) I. L. R. 5 All., 573.

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hypothecation executed by them for Rs. 1,800, on the security of the minor's property now in suit and of certain other property belonging to defendant No. 2. This deed not having been discharged defendant No. 3 instituted a suit upon it and obtained an exparte decree against the present plaintiff then still a minor, and against defendant No. 2, the former being represented by his mother and guardian, defendant No. 1. In execution of that decree defendant No. 3 caused the mortgaged properties to be sold and at the sale a portion was purchased by the late father of defendant No. 4 and another portion by one Hanumanthappa who sold to Dodd Venkatappa, from whom defendant No. 5 purchased. The plaintiff now sued to set aside these two sales as being invalid against him, on the main grounds that the decree obtained by defendant No. 3 was fraudulent and that the alienation by the guardian of the plaintiff's (minor's) property was not binding on the latter.

The Subordinate Judge held that the plaintiff was not bound by the sales and gave the plaintiff a decree subject to payment by him for improvements.

On the question of guardianship the judge remarked:—

There is another technical objection to the decree being held to be binding on the plaintiff. Though he was formally made to appear as defendant in the suit with his mother as his guardian, an order of the court as required by s. 468 of the Code of Civil Procedure was not obtained to the appointment of the mother as the minor's guardian *ad litem*, though such an appointment was absolutely necessary under Act X of 1877 then in force in Mysore. It is argued that the omission is not such as to vitiate the entire proceedings. The decisions on this point cited for the defendants are to the effect that under Act VIII of 1859 and for purposes of

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execution proceedings the omission may be considered immaterial, but no case has been cited to show that under Act X of 1877 or under Act XIV of 1882 the defect is one that can be overlooked.

As to the position of purchasers at execution sales, the judge observed :—

The question then remains whether the auction sales at which defendants Nos. 4 and 5 purchased should not also be declared invalid as against the plaintiff. It is contended that these defendants are *bonâ fide* purchasers for value without notice, and that though the decree may not be liable to be maintained, they are still entitled to retain their purchases. But I cannot agree in this contention. An auction purchaser at a court-sale stands on a different footing from a purchaser at a private sale, and it is not open to the former to set up the equitable plea of *bonâ fide* purchase for value without notice. Defendants No. 4 and 5 knew that the properties they were purchasing were those of a minor and it was for them to have satisfied themselves before the sale by proper enquiry that they were not making what might turn out to be a risky purchase. The mere fact that they honestly believed that the minor's interests were properly saleable and that they incurred no risk which is all that can be presumed in their favour, cannot help them in resisting the claim of the minor, though they may be entitled to recover their purchase monies from the decree-holder who brought about the sales. It is no doubt a hardship that these defendants should at this distance of time be deprived of what they and their predecessors in title have been enjoying for so many years past; but when the question is which of two innocent parties should suffer—the minor or the auction purchaser—the law will favour the former and not the latter, as the latter may have his remedy against the decree-holder while the former will have none.

Defendants Nos. 4 and 5 appealed to the Chief Court.

Mr. *S. Nârâyana Rao* and Mr. *C. Krishna Murti* for the appellants respectively.

Mr. *D. Vaidyanada Iyer* for the respondent.

The judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows :—

This was a suit filed by the plaintiff for the re-

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covery of immovable property in the possession of defendants Nos. 4 and 5.

Defendant No. 4 is the son of the vendee at a court-sale held in execution of a decree which had been passed against the plaintiff, and defendant No. 5 is the vendee of the property from one Dodda Venkatappa, who had in his turn purchased it from one Hanumantha Rao who also had bought it at the same execution sale.

These sales were held on the 26th October 1882 and were confirmed on the 9th January 1883.

When these appeals came on for hearing before us, the learned advocate for the appellants raised the objection of limitation and we granted an adjournment to enable the opposite party to meet this objection. The case was again argued before us and we have come to the conclusion that on the ground of the bar of limitation the suit is liable to be dismissed. We are sorry that this objection was not taken or noticed in the lower court and that all this litigation and expense have unnecessarily occurred.

The plaintiff who was a minor set up fraud and collusion on the part of his guardian and we agree with the Subordinate Judge that these allegations have not been established. So far as the appellants before us are concerned they were utter strangers and their action is not tainted with any fraud. In sales held by the court in execution of its decree these parties became purchasers and as against them the plea of fraud does not avail the plaintiff.

Then again it was contended for the plaintiff that the decree, for the execution of which these sales

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took place, was null and void as he was not properly represented and the decree so obtained could not be given any effect to. This contention is not borne out by the facts of the case. The Subordinate Judge has analyzed the evidence bearing upon this part of the case with care and precision. We accept his conclusions. The mother was the natural guardian of the plaintiff and she was legally competent to represent him in court. She did so represent him. It may be that she was badly advised and did not urge all the defences which she could have urged to meet the claim advanced against the minor, but this conduct of hers is not incompatible with her honesty and good faith.

There may have been carelessness, but certainly not fraud. The decree is not therefore liable to be impugned in a separate action. The proper procedure is that indicated by Field J. in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*(1). If the defences are such as would entitle the plaintiff to advance them as grounds for setting aside the decree they should properly be urged in a review and not in a separate action. But this point does not seem to bear directly upon the question before us as, till the decree is set aside, it is valid and binding and sales held in execution of such binding decrees cannot be set aside unless steps therefor are taken within the time prescribed by law. This point was raised in *Parshadi Lal* v. *Muhammad Zain-ul Abdin*(2) and the court refused to entertain the suit for setting aside the sale after one year from its confirmation even though the decree in execution of which the sale had taken place

(1) I. L. R. 12 Cal., 69. (2) I. L. R. 5 All., 573.

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had been reversed by the appellate court. We have no reason for not following this decision and in the suit before us the decree objected to by the plaintiff still subsists, and we have already indicated our concurrence in the ruling of the Calcutta High Court that this separate action is not the proper mode for the plaintiff to obtain the relief he wants. He has not proved any fraud.

The court sales under which the appellants hold this property being valid and binding, it is obvious that the plaintiff cannot recover the property sold under them unless and until he succeeds in setting them aside. There being no element of fraud, the case is governed by article 12 of the second schedule of the Limitation Act, which prescribes a period of one year from the date of confirmation of the sales. This date is the 9th January 1883. But on that date and till the 24th of December 1884 the plaintiff was a minor and he had a year from that date. The plaint in this suit was not presented till the 10th April 1889. We are not sure that the period during which O. S. No. 2 was pending on the file of this court* should be deducted from the computation under the Limitation Act s. 14, but even if we were disposed to do so, that suit was not filed till the 17th January 1887 and the time available to the plaintiff, that is to say, one year from the cessation of his disability had run out by the 24th of December 1885. We are for these reasons compelled to hold

*Note.—The suit was originally filed under this number in the Chief Court, but the plaint was subsequently returned to the plaintiff to be presented to the proper court, under s. 57 of the Code of Civil Procedure.

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that this suit is barred and ought to have been dismissed. We allow the appeal and direct in reversal of the decree appealed against that the suit be dismissed. As however the objection based on limitation was not taken till a late stage in this court we direct that each party bear his own costs in this court. The plaintiff will pay the defendants' costs in the lower court.

Appeal allowed. No costs. Suit dismissed.

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MISCELLANEOUS APPEALS.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

DEVAJAMMANI YAVAROO (DECREE-HOLDER) *v.* SEETHAMMA (CLAIMANT).*

1892 *June 3.*

Inchoate agreement—Proposal not sanctioned by court—Registration —Estoppel—Code of Civil Procedure (Act XIV of 1882), s. 244—Right of appeal.

A judgment-debtor presented a petition praying for leave to pay the decree by instalments, offering as security for the decreed amount lands standing in his wife's name; and she joined in the petition. The court varied the decree, with consent of the decree-holder, so far as to make it payable by instalments, but refused to make any property liable for the amount.

Held, that the position of the decree-holder was not in any manner altered to his prejudice by the conduct of the wife, and the petition could not act as an estoppel against her when subsequently claiming the lands. The petition was only a proposal not accepted, an inchoate agreement and did not evidence any transfer of the wife's rights in favor of the decree-holder: if, however, it were to be treated as a document creating or conveying any right to the decree-holder, so as to enable him to execute his decree against the lands, it could not be received in evidence for want of registration.

The Sub-judge remarked in his judgment that, by making the case fall under s. 244 of the Code of Civil Procedure he gave both parties a right of appeal.

Held, that the case clearly fell under s. 244 of the Code of Civil Procedure, with right of appeal; and it is not in the power of any judge, by following a particular procedure, to abridge or extend, at his whim or fancy, the right of appeal.

The decree-holder Devajammani, held a decree against Daroga Krishnappa and having arrested him in execution, a compromise was effected on a petition which proposed that the decreed amount should be paid by instalments with interest and that

* Appeal No. 7 of 1892, against order No. 181 of 1891 of Mr. M. Ramaswami Iyer, Subordinate Judge of Myso , dated the 21st day of October 1891.

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certain immovable property mentioned as standing in the name of the judgment-debtor's wife, should stand security for the amount of the decree, the whole amount of which was to become due on failure in payment of any one instalment. This petition was signed by Krishnappa, by his wife, Seethamma, the present claimant, and by the decree-holder, Devajammani.

The court allowed the instalments asked for and altered the decree accordingly: but declined to make the property standing in the name of Seethamma liable for the decree, on the ground that she was no party to the suit.

Krishnappa died without satisfying the decree. His widow, Seethamma, and his sons having been brought on the record as his representatives, Devajammani attached in execution, the property which was mentioned in the petition of compromise, as standing in Seethamma's name. Upon this Seethamma filed the present application for removal of the attachment, claiming the property as her own.

The Sub-judge held that Seethamma was not barred by the petition of compromise and that even if it were evidence of the surrender of her rights in the property, it could not be put in evidence without registration. He therefore allowed the claim, but without costs, under s. 244 of the Code of Civil Procedure, stating that he put it under that section in order to give the parties a right of appeal.

In argument for the claimant the cases of *Kalee Doss Gossain* v. *Mooktakeshee Thakooranee*(1) and *Surja Prasad* v. *Bhawani Sahai*(2) were relied on.

(1) 17 W. R., 218. (2) I. L. R. 2 All., 481.

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Against this order the decree-holder, Devajammani, appealed to the Chief Court.

Mr. *C. Raja Row* for the appellant.

Mr. *J. C. S. Lawrance* for the respondent.

The Order of the Chief Court (THUMBOO CHETTY, C. J., and KRISHNA MURTI, J.) was as follows :—

In this case after the death of the judgment-debtor, Krishnappa, his widow, Seethamma, was brought on the record as his representative, and the lands in dispute were attached by the plaintiff in execution of the decree. Seethamma objected to the attachment on the ground that the lands did not belong to her late husband but were her own *stridhana*. It was contended by the plaintiff, that he was entitled to proceed against the lands as Seethamma, during the lifetime of her husband, agreed to the lands being held liable for the decree. He relied upon a petition dated the 28th August 1890, presented to the court by Krishnappa with the consent of Seethamma. In that petition Krishnappa prayed for time to enable him to pay the decreed amount in instalments and pledged, or rather offered to pledge, the lands in dispute, which stood in his wife's name, as security for the debt. The court varied the decree by allowing Krishnappa to pay the decreed amount by instalments but refused to alter the decree so as to make any property liable. It is thus evident that the arrangement, with regard to the lands of Seethamma being held liable for the decree, was not accepted by the court. The petition cannot, therefore, be regarded as an instrument evidencing any transfer by Seethamma of her rights in the lands in favor of the plaintiff. If it

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is to be treated as a document creating or conveying any right to the plaintiff so as to enable him to execute his decree against the lands in dispute, it cannot be received in evidence for want of registration. It simply evidences a proposal on the part of Krishnappa and Seethamma to make the lands liable for the decree if the proposal was sanctioned by the court. The court refused to accord its sanction and the arrangement fell through, and Seethamma's right to the lands remained intact. We cannot conceive how the petition would act as an estoppel against Seethamma, as the arrangement proposed was not accepted by the court and the appellant acquiesced in that order. His position was not in any manner altered to his prejudice by the conduct of Seethamma. In this view we think that the plaintiff cannot be permitted to proceed against the lands on the strength of the petition of the 28th August 1890.

It is however open to the plaintiff to show that the lands, though standing in Seethamma's name, belong to her husband's estate and are liable for his debts. But no enquiry was held on this point. The case will be remanded to the Sub-judge for trial of the issue, whether the lands belonged to Krishnappa or whether they are Seethamma's *stridhana*, and for disposal on the merits according to law.

We wish to point out that the Sub-judge is in error in supposing, that it is open to him to follow a certain procedure so as to give to, or withhold from a party, the right of appeal. The passage in the judgment of the lower court to which we take objection is this:—" By making her case fall under

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s. 244 instead of s. 278, I gave her as well as her opponent a right of appeal." Whether a case falls under a particular section or not has to be decided with regard to the nature of the case and the provisions of the law applicable thereto. Where the law lays down a particular procedure to be followed in a particular case the court is bound to adopt that procedure. A party has the right of appeal only in those cases in which the law expressly declares he has the right of appeal. Such right cannot be abridged or extended at the whim and fancy of a judge. This is clearly a case falling under s. 244, Civil Procedure Code and the law allows the right of appeal.

Appeal dismissed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

THIMMIA (PETITIONER) v. MUSTAN SABEE (COUNTER-PETITIONER).*

1892 September 7.

Award—Code of Civil Procedure (Act XIV of 1882), ss. 525, 526 —Appeal—Code of Civil Procedure (Act XIV of 1882), s. 588.

Held, that where one of the parties to an alleged arbitration denies that he agreed to any submission, the court is bound to reject an application to file an award under ss. 525, 526 of the Code of Civil Procedure; and that from such order of refusal there is no appeal either under s. 588 of the Code of Civil Procedure or on the ground that the order must be deemed to be a decree.

The Munsiff having refused an application made by the petitioner, Thimmia, to file an award, upon the denial by the counter-petitioner that he had agreed to submit the matter in dispute to arbitration, the would-be plaintiff appealed from such order to the Chief Court.

Mr. *K. T. Narasim Iyengar* for the appellant.

Mr. *Bhima Rao* for the respondent.

* Appeal No. 18 of 1892 against order No. 915 of 1891 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 18th day of January 1891.

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The judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

This appeal raises two questions for our determination:—

The first is, whether there is an appeal against the Munsiff's order refusing to file an award under ss. 525 and 526 of the Code of Civil Procedure; and the second, whether under the circumstances of the case the order of the Munsiff is correct.

The facts are very simple. The petitioner presented an application in the Munsiff's Court to file an award and on notice being served upon the counter-petitioner to show cause, he denied having agreed to a submission of the matter in dispute for the decision of arbitrators. The Munsiff held that he had no power to enter upon an enquiry as to whether there was such submission by the counter-petitioner or not and refused to file the award.

With regard to the first question raised before us, we are of opinion that no appeal lies. These sections are not enumerated among the appealable orders under s. 588 of the Code of Civil Procedure. It cannot be contended that the order ought to be deemed a decree. The mere direction that the application shall be registered as a suit does not invest this proceeding with such a character. For, in s. 331, a similar direction has been made, but the Legislature has thought it necessary to add that "every such order shall have the same force as a decree and shall be subject to the same conditions as to appeal or otherwise." The express mention of one excludes the other and the reason why the Legislature did not intend to give a right of appeal against an order under

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s. 526 is not far to seek. The order filing the application did not bring the matter in dispute to the stage of an enforceable decree. If the court filed it, it had still to proceed to record a judgment and a decree in accordance with the terms of it, and it was this decree which became final so far as it did not exceed the terms of the award or violate any of them. The orders passed preliminary to such judgment and decree are no more than interlocutory orders and unless specially provided for, we have no right to allow appeals against them. The provision for reference to arbitration is special and has for its object the choice by the parties of a private tribunal for the settlement of their disputes. The law helps the parties to resort to such means of terminating their disputes and sanctions a summary procedure for giving effect to such settlement. Economy of time as well as of expense is an essential feature of such a proceeding. The parties can set the court in motion under this section by an application which need not be more expensive than an ordinary petition and by this provision economy of expense is secured. The other essential element is finality and it is only if all the parties are perfectly agreed with regard to the choice of the tribunal that the decision by such tribunal can be accepted as final. There ought to be no dispute in such an essential matter, and if there is a dispute the law is solicitous of the interest of the parties and does not vest its courts with power to decide it finally. The words of s. 525 are very clear. They are—"when the matter has been referred to arbitration without the intervention of a court of justice," and seem to

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imply that the reference must be a matter beyond dispute to enable the party interested to seek the summary jurisdiction vested in civil courts by this section. When there is no such reference, the court has no jurisdiction to entertain an application under this section. The question involved strikes at the root of the principle of consent which regulates this summary proceeding and when for its decision a long and protracted investigation and examination of disputed evidence become necessary, the result necessarily clashes with the finality which is an essential characteristic of the proceeding. The Legislature under such circumstances very naturally and with very good reason says that such an enquiry should rather be not held than that the simplicity of the proceeding should be spoiled. In this view it ought to be held that there is no appeal against the order of the Munsiff.

The decision of the second question appears necessary as, even if there is no appeal it becomes the duty of this court, in the words of West, J. "to hold itself ready to interfere where no other remedy is available, and where there has, in any case, been a disregard of the law amounting to an excess of jurisdiction or a perversion of the purpose of the Legislature." *Dagdusa Tilakchand* v. *Bhukan Govind Shet*(1) Much of what could be said here has been already anticipated in the consideration of the first question. The Munsiff has discussed the point fully and correctly. The whole law on the subject has been so ably explained by the distinguished judge who has been just quoted that there need be no hesitation at

(1) I. L. R. 9 Bom., 85.

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all in accepting his views, which are also in accordance with those held by Justices Field, Macpherson, Wilson and Pontifex of the Calcutta High Court. *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry*(1) The essential requisite for a tribunal of choice, *viz.*, consent, being admitted, the parties are still allowed, even when resorting to the benefit of the summary and inexpensive mode of enforcement to bring to notice any impropriety in the conduct of arbitrators, or any irregularity in their proceeding such as is enumerated in ss. 520 and 521 of the Code. When an attempt is made to discredit the actions of trusted men it needs but one enquiry by a court of justice to see whether the complaint is well or ill-founded. This seems to be the explanation of the policy of the law which makes such enquiries also final. It is only these enquiries which are allowed and not when the submission to the arbitration is itself denied. For the foregoing reasons, the order of the Munsiff seems correct and must be upheld.

Appeal dismissed with costs.

Before A. Ramachandra Iyer and P. N. Krishna Murti, Judges.

1892 July 27.

K. SESHAYA (DECREE-HOLDER AND AUCTION-PURCHASER) *v.* KOMARIA (JUDGMENT-DEBTOR).*

AND

H. SESHAYA (DECREE-HOLDER AND AUCTION-PURCHASER) *v.* KOMARIA (JUDGMENT-DEBTOR).*

Execution-sale—Setting-aside—Confirmation—Irregularities—Payment of decree by judgment-debtor after sale—Code of Civil Procedure (Act XIV of 1882) s. 316.

The court was petitioned by the judgment-debtor to set aside

*Appeals Nos. 28 and 29 of 1891 against orders Nos. 1671 and 1672 of 1890 of Mr. S. Venkatavardaniengar, Munsiff of Mysore, dated the 23rd day of March 1889.

(1) I. L. R. 7 Cal., 490; S. C., 9 C. L. R., 147.

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an execution sale on the ground of certain irregularities, and was also applied to by the auction-purchasers, who were also the decree-holders, for confirmation; but refused both applications. Leave was then granted to the judgment-debtor on a subsequent application by him to pay the amount of the decrees into court.

Held, on appeal by the auction-purchasers, that there being no irregularities, such as would justify the refusal of confirmation of the sales they must be confirmed and the court has no power after sale to accept the amount of decree from the judgment-debtor and cancel a sale or refuse to confirm it.

The lower court having refused to confirm certain sales in execution and allowed the judgment-debtor to pay up the amount of decree after the sales, the auction-purchasers appealed to the Chief Court.

Mr. *Ramaswamier* for the appellants.

The facts and arguments appear sufficiently for the purposes of this report from the order of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) which was as follows:—

These two applications have been filed by H. Seshaya and K. Seshaya, judgment-creditors in the Munsiff's Court at Mysore, who were permitted to buy and who bought, a land and a house belonging to one Komaria, judgment-debtor, at two execution sales. Their prayer is that the Munsiff who has wrongly refused to confirm their sales, may be directed to do so and to render their title as purchasers absolute.

It is perhaps necessary to mention here that these applications were the result of the withdrawal by Komaria of another appeal (Mis. No. 44 of 1890) which he had filed in this court against the order of the same Munsiff refusing to set aside the sale on the ground of the irregularities mentioned by him. Although the Munsiff refused to set aside the sale he

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had not confirmed it and as, under s. 588 of the Code of Civil Procedure, it was not very clear whether Komaria had a right of appeal before the sale was confirmed, the appeal was held in abeyance and time was granted to him to enable the Munsiff to confirm the sale. But Komaria, taking advantage of a provision in s. 316 of the Code to the effect that the property would vest in the purchaser only from the date of the certificate of sale, which is invariably the same as that on which the sale is confirmed and rendered absolute, argued that till then he had not been divested of his title, or in other words, that he still retained his right of redemption as the mortgagor of the property in both the suits; and, as the purchasers happened to be the mortgagees and decree-holders, prayed the court to allow him to exercise that right, to receive payment of the money due under the decrees into court and to cancel the sales. The Munsiff looked on these prayers as equitable and being unwilling to compel, against his wishes, the sale of the property, the ownership of which still continued in Komaria, acceded to his prayers and declined to confirm the sale.

The applications now made are, as already observed, by the decree-holders and purchasers to get the sales made absolute.

Notices were served upon the judgment-debtor and he was allowed to urge all the grounds on which he relied for setting aside the sales. We have heard the parties on more than one occasion.

The first objection now taken was not urged with earnestness at the previous hearings and it does not appear that it was relied upon in the lower court. To

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understand the force of this objection it is necessary to state that when the sales were going on in the Munsiff's court, Komaria, who had obtained a money-decree on the Small Cause side of the Sub-judge's court, brought an order from that court attaching this decree, and the Munsiff allowed the sales to go on subject to such attachment. Komaria now contends that the sales under the circumstances were irregular. We cannot accede to this contention. It is unnecessary to decide whether the Sub-judge had, as a Small Cause Judge, power to attach a decree affecting immovable property. The Munsiff has expressed his opinion to the contrary. As the sales were subject to the attachment and this point was not seriously urged before us at any of the previous hearings we have deemed it right to reject this ground with these observations.

The other grounds have been properly disposed of by the Munsiff. From the evidence on record we are satisfied that the selling of the whole land or only a half of it, when the reverse had been advertised for sale, did not in any manner prejudice Komaria. The sale was duly published and the prices fetched were not very low, so as to indicate, *primâ facie*, any irregularity in the publishing or the conducting of the sale. We are therefore of opinion that on none of these grounds are the sales liable to be set aside.

The novel question now for the first time opened by the Munsiff offers itself for determination. If it is held that the Munsiff is right, the consequence will be that till a sale is confirmed the judgment-debtor will be at liberty to pay up the money and set at

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nought all the proceedings taken to bring the property to sale. The door for mischief will thus be opened by rendering court-sales uncertain and dissuading intending purchasers from coming forward to buy property at them. Although in individual cases a judgment-debtor may have the satisfaction of retaining his property, yet the result, in the long run, will be very injurious to the judgment-debtors themselves, and we think that the Legislature omitted to adopt the provision relied upon by the Munsiff because to do so would defeat the other directions which have been laid down for rendering court-sales more definite, more certain and more reliable than before. To see this latter intention fully it is necessary to examine what the law was before, why the alterations in the words of s. 316 were introduced and how they should be interpreted to avoid conflict with the previous provisions of the Code.

According to the law as it stood when Act X of 1877 was in force, the title of the purchaser, when the sale was confirmed, related back to the date of sale. This provision of the law apparently led to many difficulties and uncertainties. To imagine a possible case, let us suppose that after a protracted enquiry necessitated under the provisions of s. 311 or s. 313, lasting for months, the sale was set aside and the whole of the purchase money had to be refunded to the purchaser. A question would naturally arise as to the disposal of the rents and profits which might have accrued on the estate between the date of sale and the date on which the sale was set aside. In the absence of a clear rule uncertainty would exist and the claim as between the parties to

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the suit and the purchaser could not be satisfied on any legal and uniform basis. The law was the same as it is now with regard to the raising of these objections and the decision of them, and it only provided for the return of the purchase money with interest. The reason for the change was apparently to remove the uncertainty regarding the rents and profits of the intervening period and to make the intention of the law clear. Accordingly the title was vested in the purchaser from the time when the sale became absolute or in other words from the date of the confirmation of the sale, which in other words again is the date of the sale-certificate. Justices Straight, Oldfield and Broadhurst, of the Allahabad High Court, referred to the words "such certificate shall bear the date of the confirmation of the sale; *and so far as regards the parties to the suit and persons claiming through or under them,* (which words they italicised) the title to the property shall vest in the purchaser from the date of such certificate and not before", and observed with reference to them that they "seemed to indicate that as between the decree-holder, the judgment-debtor, and the auction-purchaser, the sale-certificate is conclusive as to the date when the title of the latter vested." *Masarat-un-nissa* v. *Adit Ram*(1). The object thus seems pretty clearly to have been to remove the uncertainty which existed regarding the vesting of the title. The necessity strikes one with great force if a case of confirmation of sale after a great lapse of time from the date of sale is imagined.

Taking this, then, as the object of the Legislature

(1) I. L. R. 5 All., 572.

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in introducing the words relied upon by the Munsiff into s. 316 by Act XII of 1879 and since retained in the present Act XIV of 1882, it must be conceded that we shall not be justified in giving these words wider effect than what is necessary to remove the evil which seems to exist. Any further extension of the rule will, as will be shown presently, violate other positive rules with mischievous consequences.

In the various amendments made from time to time in the law relating to sales in execution of decrees, the policy of Government has been to remove all doubts, difficulties and uncertainties which dissuaded intending purchasers from coming forward freely to buy at such sales and to render the titles of such purchasers as perfect as possible. The reproach at one time to execution-sales was that a purchaser bought no more than litigation at such sales, and the present provisions of the Code have no doubt very much simplified the procedure and removed many uncertainties. Such being the aim of the Legislature, to hold that the words relied upon in s. 316 of the Code made it competent to a judgment-debtor or mortgagor to pay up the decreed money at any time before confirmation of the sale and thereby render it nugatory is, in effect, to introduce a great element of uncertainty with regard to these sales and thus to defeat the main principle on which the whole improvement of the sale-law is founded. Such an interpretation seems, moreover, opposed to the express directions specifying when and when alone a judgment-debtor can pay up the judgment loan and release the property from attachment or stop the sale altogether. Section 275 is in the following

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words: "If the amount decreed with costs and all charges and expenses resulting from the attachment of any property be paid into court, or if satisfaction of the decree be otherwise made through the court, or if the decree is set aside or reversed, an order shall be issued, on the application of any person interested in the property, for the withdrawal of the attachment." A judgment-debtor, it is unnecessary to say, is primarily interested in such property. This provision applies to the stage before the sale of property is reached. There is a similar provision applicable to that stage. Section 291 directs that "every such sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to such officer, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the court that ordered the sale." The two periods when a judgment-debtor or one interested in the property can stop the sale being thus clearly specified by the Code itself, it seems an unwarrantable and forced construction to derive from the words of s. 316 a third such period. The only condition necessary under that section is that the decree must be subsisting, which means that it should not have been reversed or otherwise cancelled.

"The power given to the decree-holder or to the person whose immovable property has been sold, to apply to set aside the sale under s. 311 is very limited. His ground must only refer to a material irregularity in publishing or conducting it. He cannot get behind the sale on other grounds. The power of the court also is very limited. It is only if it

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finds that irregularity, which has caused substantial injury to the applicant, has been proved, that it can set aside the sale. Its duty, if no objection is raised or if the objection on the specified ground is disallowed, is also laid down in imperative terms. "The court," in such a case, "shall pass an order confirming the sale as regards the parties to the suit and the purchaser" (s. 312). The court cannot evade or disobey this plain direction. It has been already held by this court that a court may of its own accord without any application by the purchaser confirm the sale. *Aravindáma* v. *Alamaláma*(1) and *Gangaram* v. *Rudranna*(2). In this case it seems to us that it is the plain duty of the Munsiff to confirm the sales, and, in reversal of the order of the Munsiff objected to, we direct that the sales of these applicants be confirmed and that they obtain their costs of these motions from the judgment-debtor.

Appeals allowed with costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 Dec. 3.

G. HANUMANTHA RAO (AUCTION-PURCHASER) v. RUNGA RAO AND OTHERS (DECREE-HOLDERS AND JUDGMENT-DEBTORS).*

Code of Civil Procedure (Act XIV of 1882) ss. 312, 588 and 622 —Order setting aside sale, appeal from—Irregularity—Limitation—Limitation Act (XV of 1877) Sch. II, Art. 166.

The Munsiff set aside an execution sale which had taken place within 30 days from the date of proclamation, upon the application of the decree-holder, which application was made more than thirty days after the sale.

Held, that there is no appeal under the Code of Civil Procedure,

* Appeal No. 30 of 1892 against order No. 204 of 1892 of Mr. S. Vardarajaiengar, Munsiff of Shimoga, dated the 15th day of August 1892.

(1) 9 M. L. R. 302. (2) Misc. App. No. 45 of 1890. *See* Appendix.

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s. 588, from an order setting aside a sale under the Code of Civil Procedure s. 312. *Further,* that the Munsiff was right inasmuch as thirty clear days had not elapsed between the date of proclamation and the date of sale, and there was no reason for the Chief Court to interfere under s. 622 of the Code of Civil Procedure.

An execution sale took place on the 3rd May 1892. On the 21st June 1892 the judgment-creditor applied to have the sale set aside on the ground of material irregularities and the sale was set aside on the 8th July 1892.

The auction-purchaser subsequently applied for review of that order on the ground that the court had overlooked the fact that the application of the judgment-creditor was barred having been made more than a month after the sale, the limitation prescribed by the Limitation Act (XV of 1877) Sch. II, Art. 166. The sale had been cancelled because it was then brought to the notice of the court that it had taken place before the expiration of a full month from the date of proclamation, that valuable property had been sold for five rupees and that two houses had been sold as one only. The lower court therefore held that the review could not be granted, for even if the judgment-creditor's application were rejected as time-barred, the court could not in any case overlook the irregularities brought to its notice and confirm the sale.

Against this order on review the judgment-creditor appealed to the Chief Court.

Mr. *Venketramiah* for the appellant.

Mr. *Ramasawmy Chetty* for the respondent.

In the matter of Mahomed Hossein(1) was referred to on behalf of the respondent.

(1) 9 C. L. R., 53.

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The judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows :—

This is an appeal from an order made by the Munsiff of Shimoga setting aside a sale.

We find that there is no appeal from the order, as s. 588 of the Code of Civil Procedure allows an appeal from an order made under the first paragraph only of s. 312.

If we entertain this as an application under s. 622 of the Code, we see no reason for our interference. It may be that the Munsiff was wrong in allowing a petition of objections to be filed more than thirty days after the sale had been made. But, on the other hand, we have the fact that thirty clear days had not elapsed between the date of proclamation and the date of sale. With this fact before him, the Munsiff was right in refusing to confirm the sale.

Appeal dismissed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

HANUMANTHAPPA AND OTHERS (PLAINTIFFS) *v.* SRINIVASA ROW, AND ANOTHER (DEFENDANTS).*

1892 *Nov.* 28.

Land Revenue Code, (Regulation IV of 1888) s. 229—Officer of Government—Construction—Jurisdiction.

Held by the Full Bench (RAMACHENDRA IYER and KRISHNA MURTI, JJ., THUMBOO CHETTY, C. J., dissenting), that the words "Officer of Government" in s. 229 of the Mysore Land Revenue Code mean and refer to Revenue officers only and therefore the Munsiff has jurisdiction to entertain and try a suit against officers of the Public Works Department, and such a suit need not be brought in the highest court of the District.

The District Judge of Nundidroog refused to entertain a suit against the Executive Engineer of

*Appeal No. 36 of 1892 against order No. 508 of 1892 of Mr. B. S. Krishnaswamiengar, Munsiff of Chickballapur, dated the 27th day of June 1892.

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Kolar, holding that s. 229 of the Mysore Land Revenue Code by which suits against "Officers of Government" could be brought only in the District Court, had no application to officers of the Public Works or other Departments than that of Land Revenue. An appeal to the Chief Court against this order was made by the plaintiffs as the Munsiff of Kolar, holding opposite views to those of the District Judge, had refused to receive the plaint.

Mr. *Srinivasiengar* for the appellants.

The *Assistant Government Advocate* and Mr. *Narayana Rao* for the respondents.

The judgments of the Full Bench of the Chief Court (THUMBOO CHETTY, C.J., RAMACHENDRA IYER and KRISHNA MURTI, JJ.) were as follows:—

THUMBOO CHETTY, C.J.—The plaintiff sued to recover Rs. 96 as damages from the defendants (the Executive Engineer and the Public Works Maistry, Kolar), for certain wrongful acts alleged to have been committed by them in their official capacity.

The suit was first instituted in the court of the District Judge of Nundidroog under s. 229 of the Mysore Land Revenue Code. That court returned the plaint for presentation to the Munsiff, as the value of the subject-matter was within his jurisdiction.

The Munsiff held that, under s. 229 of the Mysore Land Revenue Code, the suit was not cognizable by him.

The plaint was a second time presented to the District Judge, who again refused to entertain it, on the ground that the defendants are not Revenue fficers and that, reading s. 229 with the preamble of

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the Revenue Code, it was clear that it was a suit against Revenue officers that could not be entertained by the Munsiff, and not a suit against officers of the P. W. D. It is against this second order of rejection passed by the District Judge that this appeal has been preferred.

Section 229 is in these words:—"No Munsiff, Subordinate Judge, or Court of Small Causes, shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party; but, in every such case, such Munsiff, Judge or Court shall refer the plaintiff to the District Judge, in whose court alone such suit shall be instituted."

Reading the preamble of the Code and the sections in chapter XIV preceding and following s. 229, it is obvious that what was intended by the framers of the Code was, that that s. 229 should apply only to suits by or against Government, or any Revenue officer of Government, but they have not prefixed the word "revenue" to "officer." "When the words (of an enactment) admit of but one meaning, a court is not at liberty to speculate on the intention of the legislature, or to construe an Act according to its own notions of what ought to have been enacted." *See* Maxwell on the Interpretation of Statutes, 2nd ed., p. 6. The language of the section (229) taken by itself being plain and explicit, there is no room for construction; though I admit it may be inferred, from the preamble and other sections in chapter XIV, that it was not intended that a suit by or against officers of Government not within the definition of "revenue officer" (*see* s. 3, cl. 1) should be instituted only in the highest court in the District, that is, that of the

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District Judge. The inconvenience and expense that would attend such a provision would indeed be great; but this court has nothing to do with the intention of the legislature which has not been expressed; it is bound to expound and give effect to the law as it stands and according to the real sense of the words.

I would, therefore, direct the District Judge to receive the plaint and to dispose of it according to law. The costs of this appeal to abide the result.

RAMACHENDRA IYER, J.—Section 229 of the Mysore Land Revenue Code enacts that a suit in which the Government or "any officer of Government in his official capacity" is a party shall not be entertained by a Munsiff, Subordinate Judge, or Court of Small Causes. The point for determination is, whether the words "any officer of Goverment in his official capacity" mean any officer generally or any officer in the Revenue Department whose powers and duties are defined by the Code.

The *Assistant Government Advocate* and Mr. *Narayana Rao* contend that the words clearly apply to any officer of Government. They say that, whenever the legislature intended to apply any provision of the Code to Revenue or Survey officers, the word "Revenue" or "Survey" has been inserted before the word "officers," and that as no such word has been used to qualify the word "officers" in the section before us, we must presume that it was the intention of the legislature to make a general provision in regard to all suits against the Government or any officer in his official capacity.

If this argument is right, we must put the same interpretation upon the word "officers" used in s. 20,

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which enables the Government to direct any officer other than Deputy Commissioners and the Superintendent of Survey, to appoint all members of their establishments; and we must hold that the Government has taken power by this section to direct the Railway Engineer, or the Commander of the Force for Imperial Service to appoint all members of their establishments.

The preamble shows that the intention of the legislature was to consolidate and to amend the law relating to Revenue officers, and to the assessment and recovery of Land Revenue and to other matters connected with the Land Revenue administration. The Regulation is divided into fifteen chapters and each chapter deals with a topic which is immediately connected with the purpose set out in the preamble. If we consider the contents of each chapter, we nowhere find any trace of an intention on the part of the legislature to deal with any topic which was unconnected with and extraneous to the object of legislation.

The different heads under which the sections of an Act are arranged "indicate the general object of the provisions immediately following; and these may be usefully referred to, to determine the sense of any doubtful expression in a section ranged under a particular heading." *Hammersmith, &c., Railway Co.* v. *Brand*(1). The section in question finds a place among a group of sections which are ranged under the heading "Revenue Jurisdiction." Section 221 enacts that certain classes of suits shall be cognizable by revenue courts and not by civil courts.

(1) L. R. 4 E. and I. App., 203.

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Section 222 engrafts an exception upon the preceding section. Sections 223 and 224 exempt revenue officers from civil liability in respect of certain official acts. Section 226 empowers the Government to refer certain questions to the Chief Court for opinion; and s. 227 authorizes a Civil Judge to refer to the Chief Court, when he feels a doubt on the question of jurisdiction. Then comes s. 229 which enacts that suits against a Government officer shall be entertained only by District Judges, and the following section empowers the Government to claim precedence over the trial of any other suit. The natural order of the sections convinces me that s. 229 contemplates suits against officers of the Revenue Department and not of other Departments. Certain classes of revenue suits are withdrawn from the jurisdiction of civil courts. Then revenue officers are assured protection from civil liability in respect of certain official acts. Lastly we find a provision that trial of suits against revenue officers shall, under certain circumstances, claim precedence over the trial of other suits. If, among these sections, we find a section which enacts that suits shall be brought in District Courts only, I am of opinion that the officers whose rights and liabilities are defined by the chapter are the only officers who are in the contemplation of that section.

If s. 229 was intended to apply to all officers, I should think that ss. 223 and 230 would have been differently worded. Why should revenue officers alone be exempt from civil liability in respect of acts *bonâ fide* done by them? Why was no exemption made in favor of, say, the officers of the Public

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Works Department? If precedence may be claimed in regard to suits filed against officers of the Revenue Department, why was no similar reservation made in regard to suits filed against the officers of other Departments?

In other parts of the Code, we find the word "officer" used without any prefix and the word, I think, means "revenue officer" and not any officer. For instance, s. 196 empowers revenue officers to summon persons to give evidence. The next section which gives power to examine witnesses on commission used the word "officer" only without a prefix. Similarly s. 202 refers to "officers" which must mean "revenue officers."

I am of opinion that the variance is undesigned and that "officers" and "revenue officers" mean the same thing. The Munsiff was wrong in declining to receive the suit. His order must be reversed and he must be directed to receive and register the plaint.

KRISHNA MURTI, J.—The point raised for determination in this case is, whether the words "or any officer of Government" used in s. 229 of the Land Revenue Code mean any officer of Government or only Revenue officers, as defined by clause (1) of s. 3 of the Code. The point was ably argued by both the *Assistant Government Advocate* and Mr. *Narayana Rao* in support of an extended interpretation to be given to these words, so as to comprise all officers of Government, irrespective of the Department of State in which they are serving, while it was contended by Mr. *Srinivasiengar*, that the words should be restricted to revenue officers only.

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I have also had the benefit of reading the judgments recorded by my learned colleagues. Nevertheless, I confess I have not been able to form a decisive opinion regarding the intention of the legislature in framing this section.. As observed by the learned Chief Judge, the words used are not in themselves doubtful or ambiguous and the primary duty of an interpreter is to attach to the words used the full meaning signified by them. But the removal of a large class of suits from the jurisdiction of the ordinary civil courts is attended with much expense and inconvenience. This ground alone is not sufficient to modify or restrict the signification of the words used, if it is very clear that the policy of the legislature is to exclude from the jurisdiction of our subordinate courts, all cases by or against Government officers in their official capacity. If it is the intention of the legislature to place such a general restriction, it cannot but be conceded that such a wide rule is misplaced in a special enactment applying avowedly to the special subject of "Revenue Officers and the Assessment and Recovery of Land Revenue, and to other matters connected with the Land Revenue Administration." The context, as pointed out in detail by my learned brother, MR. RAMACHENDRA IYER, is certainly in favor of a restricted interpretation. I should have adopted this opinion without any reserve or doubt, if there were no clear indications in any part of the Code that it did not comprise matters not strictly falling within the subjects specified in the preamble. To cite an instance, I would refer to s. 193, according to which the provisions of that chapter are made to apply

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"to all moneys due by any contractor for the farm of customs duties, or of any other duty or tax, or of any other item of revenue whatsoever." This provision indicates that the legislature had it in its intention, to apply the rules of the Code to other cognate subjects, not strictly falling within the purview of the Code, whenever such a course appeared feasible or necessary. In this view it is not easy to say that the variance in the wording of this section is undesigned. Section 230 throws no light on this point, as it is not co-extensive with s. 229. The wording of s. 230 shows that a suit against Government is deemed permissible; though, by the way, it may be noted that this course is not quite in accordance with chapter XXVII of the Code of Civil Procedure, according to which, it may be said, that suits against the Government of Mysore were not in contemplation at all. If, then, there are suits both by and against Government, why should the privilege of precedence be reserved only to cases where Government or its officer is a defendant. Section 229 removes from the jurisdiction of subordinate courts all the cases in which Government or its officer is a party whether as plaintiff or defendant. It does not seem possible to derive much instruction from a consideration of the consistency or reconciliation between all the provisions of the Code.

In chapter XXVII of the Code of Civil Procedure relating to suits by Government or by or against public officers, to which reference has been already made by me, s. 425 directs that "no warrant of arrest shall be issued in such suit without the consent in writing of the District Judge." This limitation

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obviously refers to the powers of courts subordinate to a District Judge; and if it was the intention of the legislature who framed the Revenue Code to remove all such suits from the jurisdiction of such courts, the rule which would have become inoperative would not have been allowed to remain as a portion of unrepealed statute law. This circumstance is clearly opposed to the extended application of the rule of the Revenue Code under consideration.

The context, the inconvenience resulting from giving an extended effect to the words used, and the apparent conflict which seems to exist between the provisions of the Revenue and Civil Procedure Codes show the desirability of restricting the operation of the phrase "Government officers." The intention of the legislature cannot, as I have already stated, be very clearly gathered, but the reasons preponderate and show the necessity for giving these words the meaning which best suits the scope and object of the statute. All words such as are general and not express and precise should be restricted to the fitness of the matter.

I have, therefore, in view of these considerations, resolved to hold that the restriction placed by s. 229 of the Revenue Code applies only to Revenue officers as defined in the said Code, and that this suit which is against the officers of the Department of Public Works, is cognizable by the Munsiff under the general law in force in this country.

Appeal dismissed.

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CIVIL REFERENCES.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

R. VENKATA DASAPPA (PLAINTIFF) v. CHICKA NARAYANA REDDY AND OTHERS (DEFENDANTS).* 1892 *May 16.*

General Stamp Act (I of 1879), ss. 34 & 49—Reference in appealable case—Amount of duty—Nature of document—Doubt by referring court.

Reference was made in an appealable case on the question whether a document was a promissory note or a bond. The referring court professed to make the reference under s. 49 of the General Stamp Act and expressed that it was made not on account of any doubt in the matter but in compliance with the request of the plaintiff's pleader.

Held, that a Judge is not competent to make a reference under the Stamp Act in an appealable case nor where he has admittedly no doubt on the question.

Further, that s. 49 of the Stamp Act does not authorise a reference as to the nature of a document, but only as to the amount of Stamp-duty leviable thereon.

This was a reference made by the Munsiff of Chickballapur under the General Stamp Act (I of 1879).

The reference was in the following terms :—

The suit is brought for the recovery of Rs. 130 due on Ex. *A*.

Exhibit *A* is clearly a document whereby the 1st defendant obliges himself to pay Rs. 100 to the plaintiff three months after date. It is signed by defendant No. 1 and is not attested by witnesses. It bears a stamp of the value of one anna. The plaintiff swears that the document was executed to him in consideration of money advanced at the time of execution and admits that his suit is expressly based on the document itself.

I think the document in question is a promissory note. The amount being Rs. 100 and payable otherwise than on demand, the

* Civil Reference No. 2 of 1892 made by Mr. B. S. Krishnaswamiengar, Munsiff of Chickballapur, in O. S. No. 94 of 1892, dated the 1st day of April 1892.

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document should have been executed on a two annas stamp-paper. Hence it is a promissory note which has not been duly stamped under the Stamp Act.

Under s. 34 of the same Act I think the document ought to be shut out of evidence altogether, and this suit which is admittedly based on it ought necessarily to fail.

The plaintiff's pleader contends that the document is a bond and says he will pay the requisite duty and penalty, should his contention be acceded to. I have no doubt in the matter, because the same question has been decided by the Chief Court in accordance with my view on a reference made by me when I was in charge of the Sagar Munsiff's Court; but that ruling of the Chief Court has not been published in the Weekly Notes, and the plaintiff's pleader says that there may be a possible difference between the terms and nature of the instrument now in controversy and those of the instrument which was the subject of my former reference.

The pleader prays therefore that if his view be not adopted the matter may be referred for the opinion of the Chief Court under s. 49 of the Stamp Act.

The point for decision is whether Ex. *A*, herewith submitted, is a promissory note or a bond?

My opinion is that the document is a promissory note and not a bond, and that it should have been executed on a stamp-paper of two annas.

The Full Bench of the Chief Court (THUMBOO CHETTY, C.J., RAMACHENDRA IYER and KRISHNA MURTI, JJ.) pronounced the following opinion:—

The object of this reference, which purports to be one made by the Munsiff of Chickballapur under s. 49 of the General Stamp Act, is, to elicit the opinion of this court on the question, whether Ex. *A*, on which the plaintiff sues, is a promissory note or a bond. The Munsiff was of opinion that the document was a promissory note payable otherwise than on demand, that it ought to have been executed on a stamp of the value of two annas instead of on an adhesive stamp of the value of one anna, and that, under the provisions of

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s. 34 of the Stamp Act, the document was inadmissible in evidence. The Munsiff added that he had no doubt in the matter, but that he referred the question for the opinion of the Chief Court on the application of the plaintiff's pleader.

The suit was to recover Rs. 130, and, in an appealable case like this, the Munsiff was bound to decide the question himself in accordance with his own view of the law, leaving the party aggrieved by his decision to prefer an appeal in the usual course. *See* the rulings of this court in *Chickveeray Gowda* v. *Hoochaveerappa*(1) and *Vencata Subha Bhatt* v. *Thimma and another*(2). The Munsiff was, therefore, not competent to make this reference.

Section 49 of the Stamp Act provides for a reference being made to the Chief Court in a case in which a court feels doubt as to the amount of duty to be paid in respect of any instrument under the first proviso to s. 34. In this case, the Munsiff admits that he had no doubt in the matter. He was, therefore, not competent to make the reference under the section. It must also be observed that the question referred is not as to the amount of stamp-duty leviable on the plaint-document, but as to the nature of the document, whether it was a promissory note or a bond. This question does not come within the scope of s. 49 of the Act.

This court must, therefore, decline to give its decision on the reference. The record will be returned.

(1) Civil Reference No. 6 of 1884. Appendix, *infra*.
(2) Civil Reference No. 2 of 1885. Appendix, *infra*.

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Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 *June* 20.

NADIGSWAMY RAO (PLAINTIFF) *v.* THE DEPUTY COMMISSIONER OF SHIMOGA DISTRICT, REPRESENTING THE MYSORE GOVERNMENT, AND ANOTHER (DEFENDANTS).*

Land Revenue Code (Regulation IV of 1888), s. 221—Exclusion of jurisdiction of civil courts—Onus on plaintiff to show exemption.

The Land Revenue Code (Regulation IV of 1888), s. 221 prohibits the resort to civil courts in revenue matters except in specified cases. *Held* that a plaint which does not allege such facts as may bring the case within the exceptions named in the code should be returned by a civil court as barred from its cognisance, it being the duty of the plaintiff to make out exceptional circumstances showing that the court has jurisdiction.

This was a reference made under s. 227 of the Mysore Land Revenue Code, as to the jurisdiction of the civil court. The material part of the Order of reference was as follows:—

The 1st defendant objects to the jurisdiction of this court under the provisions of s. 221 cl. (*f*) of the Revenue Code, on the ground that the suit is really a claim against Government to hold land free from payment of land revenue, and it is enacted that no civil court shall exercise jurisdiction in regard to any such matter.

The plaintiff per contra relies on cl. (*i*) of the same section, illustration (2), and pleads that he sues to hold certain land as exempt from assessment on the ground that it has been so held by him, and is so entered in the land register.

But from the inam register filed it does not appear that the land is entered therein, and I do not think that the mere inclusion of the land in dispute within the limits of a certain number by the Survey and Settlement Department can give the plaintiff a right which he otherwise would not have.

The question is not however free from doubt, and I therefore submit the whole of the proceedings and papers to the Chief Court for a ruling on the point whether this court can entertain the suit or not.

* Civil Reference No. 3 of 1892 made by Mr. C. Cress, District Judge of Nagar in O. S. No. 24 of 1891, dated the 2nd day of May 1892.

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NADIGSWAMY RAO v. THE DEPUTY COMMISSIONER OF SHIMOGA.

The Full Bench of the Chief Court (THUMBOO CHETTY, C.J., RAMACHENDRA IYER and KRISHNA MURTI, JJ.) pronounced the following opinion :—

This is a reference made by the District Judge of Nagar under Regulation IV of 1888, the Land Revenue Code.

The suit was filed against the Mysore Government, represented by the Deputy Commissioner of Shimoga, and the prayer for relief was for a cancellation of the Dewan's order No. 2443 of 1889 and a declaration that the land described in the plaint-schedule forms portion of a personal inam attached to Survey No. 11 and is not liable to pay assessment to Government; also for refund of *kundayem* recovered from the plaintiff for eight years.

The defendant objected to the jurisdiction of the court to entertain the suit.

The judge though inclined to view the objection taken to the jurisdiction of the court as sound, was of opinion that the question, which was important, was not free from difficulty and doubt, and has submitted the question for the decision of this court.

As a matter of fact the District Judge states that the land in suit is not included in the inam title-deed filed on the record.

Section 221 of the Land Revenue Code excludes certain matters from the jurisdiction of civil courts, and cl. *(f)* relates to "claims against Government to hold land wholly or partially free from payment of Land Revenue."

Primâ facie the suit as framed by the plaintiff does not lie and the plaint does not refer to any exceptions inserted in this section. The plaint, we

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NADIG-SWAMY RAO *v.* THE DEPUTY COMMIS-SIONER OF SHIMOGA.

are constrained to remark, is a most unsatisfactory document. The statement of facts is by no means clear. The District Judge ought to have insisted upon a more accurate description of the facts relied upon by the plaintiff. As it is, there being no exceptional circumstances mentioned in the plaint we fail to see how the objection taken by the defendant can be met. If there are any such circumstances it is for the plaintiff to obtain permission of the court to file another plaint or have the present one amended. But so far as the facts mentioned in the present plaint go we are of opinion that no facts are alleged to bring the case within the exceptional clauses (*h*) and (*i*). The advocate for the plaintiff represented to us that the land has been entered as inam in the land register called *Khetvar Patrike*. The printed Inam Register would also have thrown light upon the case and rendered the application of Ill. (2) attached to the section, clear. But these documents are not before us and, as we observed before, it is for the plaintiff to seek an opportunity to state his case fully and to make out that he can seek the help of a civil court to obtain the relief he prays for.

Upon the facts before us we are of opinion that the objection taken by the defendant to the jurisdiction of the court should prevail, and we accordingly direct under s. 227 of the Revenue Code that the District Judge shall return the plaint.

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CIVIL REVISION.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

KRISHNAPPA AND OTHERS (PLAINTIFFS) *v.* CHENNA BASAPPA AND OTHERS (DEFENDANTS).* 1892 *Dec. 3.*

Small Cause Court—Jurisdiction—Suit for damages for trespass—Incidental decision as to title.

The mortgagees with possession of a village sued on the Small Cause side of the Munsiff's Court to recover damages caused by the trespass of the defendants. The Munsiff dismissed the suit as being not maintainable in a Small Cause Court.

Held, that there was nothing to prevent the decision by the Small Cause Court of the question of damages, even though the question of title had to be incidentally adjudicated upon; and in any case the Munsiff ought to have transferred the case to his regular file and tried it as an ordinary suit. He was wrong in dismissing it.

This was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882) by the plaintiffs in a suit brought by them on the Small Cause side of the Munsiff's Court, and which was dismissed as not being maintainable in a Small Cause Court.

Mr. *Ramaswamier* for the petitioners (plaintiffs).

Mr. *S. Ramaswamiengar* for the counter-petitioners (defendants).

The following judgment was passed by the Munsiff:—

The suit is brought for the recovery of Rs. 40.

The points for determination are:—

(1) Is the suit maintainable?

(2) Are the plaintiffs entitled to maintain this suit without establishing their right to the possession of the village in question?

I do not think this suit is maintainable. The plaintiffs as mortgagees of a certain village sue to recover Rs. 40 from the defendants

* Civil Revision Petition No. 200 of 1892 against S. C. decree No. 548 of 1892, of Mr. B. S. Krishnaswamyiyengar, Munsiff of Chickballapur, dated the 8th day of September 1892.

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alleging that they trespassed upon the village and carried away certain crops and cut some trees. The defendants *inter alia*, deny the plaintiffs' title and their right to be in possession of the village. Under these circumstances I do not think that the plaintiffs can recover any damages without establishing their right to be in possession of the village which is alleged to have been trespassed upon.

It seems to me that a plaintiff cannot recover damages for trespass upon immovable property without establishing his right to that property. Such a relief has not been asked for in this suit, which has been brought on the Small Cause side. I must therefore find on the 1st and 2nd points that this suit is not maintainable, and that the plaintiffs cannot recover any damages from the defendants without establishing their (plaintiffs') right to the village in question. I dismiss plaintiffs' suit with costs.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows :—

We are of opinion that the Munsiff was wrong in dismissing the suit. The plaintiffs alleged that they had been in undisturbed possession of the village for a long time and that the defendants committed trespass and caused damage to them. As the suit was for damages for the wrongful loss caused by the defendants, there was nothing to prevent the judge from adjudicating on the question, even if he had to adjudicate incidentally on the question of title. If, however, he was of opinion that there was a *bonâ fide* dispute between the parties in regard to the question of possession, that a right to immovable property was really involved in the suit, and that it was not a question for adjudication by a Small Cause Court, he was not prevented from transferring the suit to his regular file and trying it as an ordinary suit. We reverse the decree and send the case back to the Munsiff to be disposed of in accordance with the directions contained in this order.

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The costs of this application will be costs in the cause and will abide the result of the suit.

Decree set aside. Suit remanded for trial.

FULL BENCH REFERENCE.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

IN THE MATTER OF HIRANIAPA, A PLEADER.*

1892 May 9.

Legal Practitioners Regulation (No. III of 1884)—Gross professional misconduct—Punishment.

A second-grade pleader, considering that a remark made by a Munsiff in a judgment reflected upon his professional skill and knowledge, wrote a scandalous letter to the judge impugning his partiality and exhorting him not to transact business on the bench while under certain influences and prejudices. *Held*, that the pleader was thereby guilty of gross professional misconduct and rightly punishable by suspension for twelve months, as recommended by the District Judge.

Per RAMACHENDRA IYER, J.—I do not blame the pleader for writing the letter; but I blame him for the matter put in that letter. Assuming that the remark made by the judge was injurious to his character, he was wrong in traducing the munsiff's character.

Per KRISHNA MURTI, J.—Any enquiry as to whether the pleader had any grievance against the munsiff, real or imaginary, is quite irrelevant to the case.

This was a Reference to the Chief Court made by the District Judge of Mysore under the Legal Practitioners Regulation (No. III of 1884) recommending, as the result of an enquiry under that Regulation, that a second-grade pleader named Hiraniapa should be suspended for a period of one year for gross professional misconduct.

Mr. *Nunjundappa* for pleader Hiraniapa.

The facts of the case appear sufficiently from the

*Reference under the Legal Practitioners Regulation III of 1884, by Mr. C. Srinivasiengar, District Judge of Mysore.

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judgments of the Full Bench of the Chief Court (THUMBOO CHETTY, C. J., RAMACHENDRA IYER and KRISHNA MURTI, JJ.) which were as follows:—

THUMBOO CHETTY, C. J.—This is a case which has been reported to this court for orders under s. 15 of the "Mysore Legal Practitioners Regulation, 1884."

The enquiry was held in regard to the alleged misconduct of Hiraniapa, a second-grade pleader, practising in the court of the Munsiff of Hole Nursipur, Mysore District.

The facts are briefly these:—One Dyavai Gowda sued, in O. S. No. 624 of 1890, one Kala on a bond. Hiraniapa was pleader for Kala. The defence put forward in the suit was that although the bond was executed in Dyavai Gowda's name yet one Lingamma was the person who lent the money and recovered from Kala two years' interest and that Dyavai had no right to sue. Judgment was given for the plaintiff on the 26th June 1891. On the 29th idem Hiraniapa sent a letter to the Munsiff, Srinivasa Rao, protesting against a remark said to have been made by the Munsiff in his judgment in the suit to the effect that he (Hiraniapa) did not at all question Lingamma regarding the alleged payment of interest to her and finding fault with the Munsiff for not acting impartially and without prejudice. The letter specially alludes to one Anundalwar not having vacated his house for pleader Subana and to the Munsiff having blamed Hiraniapa for the same and exhorts the Munsiff not to transact business on the bench while under the influence of the said pleader Subana and his party.

The District Judge found (1) that the Munsiff's

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judgment did contain a remark, as to Lingamma not having been questioned about interest, which the Munsiff scored out subsequent to the receipt of Hiraniapa's letter, but that the remark could not be construed to be an insinuation against the pleader so as to justify his sending the letter in question to the Munsiff; (2) that the Munsiff had nothing whatever to do with procuring the house of Anundalwar for pleader Subana for a marriage; (3) that there was nothing to show that the Munsiff ever showed favor to Hiraniapa's antagonists and disfavor to Hiraniapa; and (4) that the letter Hiraniapa wrote to the Munsiff was a highly improper and impertinent letter. The District Judge found Hiraniapa guilty of grossly improper conduct in having addressed to the Munsiff the letter of the 29th June imputing partiality and prejudice to the Munsiff and recommended his suspension to the end of June 1892.

On perusal of the proceedings and after hearing the arguments of Mr. *Nunjundappa* on behalf of Hiraniapa it seems to me that there was no justification whatever for Hiraniapa addressing the letter he did which had a tendency to vilify and disgrace the Munsiff and contained scandalous aspersions on the Munsiff's conduct as a judge.

The Munsiff denies that the remark in his judgment, referred to in Hiraniapa's letter, was pronounced. He states that it was scored out before the judgment was pronounced. This part of the case is not quite free from doubt. Assuming for the sake of argument that that remark was actually read in open court, if Hiraniapa felt himself aggrieved by the remark he could have then and there

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stated to the Munsiff that he was not to blame for the omission pointed out. Or if he thought that that remark was not supported by the proceedings and that there was a miscarriage of justice owing to the erroneous impression of the Munsiff, an application for review of the judgment might have been presented in the usual course. Instead of adopting either of the courses indicated above, Hiraniapa states that he sought for a personal interview with the Munsiff in his house and as that was refused he wrote the letter in question. This explanation is altogether unsatisfactory. A member of the Bar had no business to go to the Munsiff's house to speak to him on court business. Hiraniapa has evidently failed to realize his position as a pleader and in seeking for a private interview to talk to the Munsiff about a judicial proceeding has betrayed his incompetence to discharge the duties of his profession. His trying to argue with the Munsiff in a private letter on subjects which should have been brought forward by means of a petition duly presented and by arguments addressed in open court cannot but be regarded as gross professional misconduct.

The letter is not confined to merely pointing out to the Munsiff the impropriety of the alleged remark, but it imputes partiality to the Munsiff and refers to his being influenced, in the administration of justice on the bench, by a pleader Subana and his party. There is not a particle of evidence, as remarked by the District Judge, to prove that Subana or the other members of the Bar ever exercised, either directly or indirectly, any influence with the Munsiff in any judicial proceeding, and the general insinuation con-

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tained in the letter and the advice given to the Munsiff are, to say the least, most scandalous and quite unjustifiable.

The letter also aimed at insinuating that the Munsiff was annoyed with Hiraniapa because he did not help to induce one Anundalwar to give his house to Subana for a marriage. The District Judge has very properly discredited the evidence adduced on this point. There was not the slightest motive for the Munsiff to interfere in such a small matter.

I think Hiraniapa had not the slightest cause for maligning the Munsiff in the manner he has done, that his conduct in sending the letter in question was grossly improper and that he well deserves the suspension which is recommended to be awarded to him. I would uphold the District Judge's findings and make the order of suspension absolute and allow it to continue till the end of June.

I felt on first reading the proceedings, that the punishment recommended by the District Judge was not sufficiently severe, but having regard to the remarks of my learned brother RAMACHENDRA IYER and the recommendation made by the District Judge who enquired into the case, I am not disposed to enhance the period of suspension.

RAMACHENDRA IYER, J.—I gather from the record that the pleader had a grievance. Whether it was real or fancied, it is unnecessary to determine. His grievance was that the Munsiff made a remark in a judgment which was a reflection upon his professional skill and knowledge, and that the remark was intentionally made because the Munsiff was prejudiced against him. He did not think that the decree was wrong, or that there was anything to be said against

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the reasons given by the Munsiff for passing a decree against his client. There was no ground for making an application for review of judgment or under any section of the Code of Civil Procedure. His complaint was not so much against the remark itself as against the feeling of the Munsiff which had induced him to make that remark; and he wished to efface that feeling from the judge's mind. If he complained against the Munsiff's remark in open court, by an oral application or by a petition, his wish would not be realised, and it was possible that the bad feeling might be confirmed and strengthened. He begged for an interview that he might give a personal explanation, and not to talk about matters strictly judicial. If an interview was granted and he respectfully made an explanation and endeavoured to remove the judge's misconception, or if, when an interview was refused, he submitted a written explanation and sent it in a registered cover so that the Munsiff alone might read it, I am not prepared to hold that his conduct deserved to be characterized as scandalous or unprofessional.

I do not blame the pleader for writing the letter; but I blame him for the matter put in that letter. Assuming that the remark made by the judge was injurious to his character, he was wrong in traducing the Munsiff's character. The statement that the Munsiff was under the influence of pleader Subanna's party and that he allowed that party to influence him in the discharge of his judicial work, ought not to have been made by the pleader. It is for making this unfounded and defamatory statement that I agree with the Chief Judge in suspending the pleader from practice till the end of June 1892.

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I think the punishment recommended by the District Judge does not err on the side of leniency, and that there is no reason to make it more severe.

KRISHNA MURTI, J.—Any enquiry as to whether the pleader had any grievance against the Munsiff and whether such grievance was real or imaginary is to my mind quite irrelevant to this case. The Institution of the Bar is a necessary part of an enlightened organisation for the administration of justice and high morale. Purity and independence, as well as an adequate sense of self-respect, are as necessary in every member of it as in every judge. Although it cannot be denied that there is an amount of inter-dependence between a pleader and a judge, yet it should not be overlooked that, in matters coming up before either judicially, any attempt at personal recrimination or explanation is highly prejudicial to the well-being of both these branches of the judicial administration. If a judge has reason to be dissatisfied with the conduct of a pleader in his professional capacity as a pleader the law has laid down a course for correcting him. If, on the other hand, a pleader has reason to find fault with a judge he must only have recourse to properly established means of obtaining redress. It is certainly objectionable to seek to influence the conduct of a judge towards him by means of private communications whether oral or written. When successful the attempt will be looked upon as a resort to ungentlemanly or servile means and when not successful the relation will be rendered more bitter than before. In either view such a course does not recommend itself to me as being expedient or justifiable and I am not prepared to uphold the

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conduct of Hiraniapa in writing the letter under reference to the Munsiff. He showed thereby that he is incapable of controlling his temper, and of taking a calm view of his position and of the respect due to himself. He has put on the appearance of an extremely servile being while he has not spared the Munsiff any amount of abuse. The tenor of the letter is highly objectionable not to say that it is insulting and defamatory. The sentiment though expressed in abject words is highly contemptuous and if the Munsiff had not taken notice of this letter I should have doubted his fitness to remain as a judge. I have no hesitation therefore in concurring with the District Judge and finding Hiraniapa guilty of grossly unprofessional conduct.

Regarding the punishment I am of opinion that the District Judge's recommendation is very lenient. The pleaders of Hole Nursipur have made a name for themselves and I do not know whether Hiraniapa was one of those who had been suspended once before. We are constantly hearing complaints that these Second-Grade Pleaders are, as a body, not giving satisfaction, and lenient and inadequate punishments are apt to be misunderstood. They will thus lose their corrective and deterrent virtue. It is not always that the unprofessional conduct of a pleader is brought home to him and when there is a conviction the punishment ought to be efficacious. In this view I would extend the term of prohibition to Hiraniapa's practising in the Hole Nursipur Munsiff's court to a period longer than a year, although his suspension might cease at the end of June as agreed to by my learned colleagues.

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CRIMINAL.

REVISION.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

RAMASWAMIA (COMPLAINANT) *v.* VENKATASUBBA (ACCUSED).* 1892 *July* 12.

Master and servant—Criminal responsibility—Acts mala in se—Guilty knowledge—Mala fides—Assumption of—Fees under Court Fees Act.

The *mala fides* and guilty knowledge of a servant should be positively and affirmatively proved and ought not to be presumed.

Guilty knowledge or intention is an essential ingredient in the offence of mischief and when this is wanting, the conviction cannot be upheld.

Fines and fees under the Court Fees Act ought not to be mixed up in awarding punishment.

One Lakshminaranapa possessed a house adjoining that of the complainant, Ramaswamia. He received a notice from the Municipal authorities to repair the premises. His servant, Venkatasubba, the accused, in the course of carrying out these repairs was alleged by the complainant to have obstructed his right of way by digging a pit in a path leading to his house, to have removed a door, some stones and roofing, and to have stopped the flow of water in a certain drain, thereby committing criminal trespass and mischief with which the complainant charged him.

The magistrate convicted the accused of mischief punishable under s. 426 I. P. C. and sentenced him "to pay a fine of Rs. 15 (with court fees and costs

* Criminal Revision No. 26 of 1892 of order of Mr. S. Venkatavardaniengar, First-class Magistrate of Bangalore in Criminal Case No. 20 of 1892, dated the 7th day of March 1892.

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Rs. 4/8) or otherwise to suffer simple imprisonment for a week. If the fine is paid, the amount of fees and costs (Rs. 4/8) will be paid to complainant by way of compensation."

Application was made to the Chief Court for revision by Mr. *Jayaramier* on behalf of the accused, Venkatasubba.

The Order of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows :—

A notice was served upon the complainant in this case, but he did'not appear.

After hearing Mr. *Jeyaramier* for the petitioner and considering the circumstances of the case, we have come to the conclusion that the conviction is wrong and must be set aside.

The petitioner is the agent of one Lakshminaranapa, under whose instructions he is admitted to have acted. The Sub-Judge has referred to no other evidence than a presumption which he thinks arises under the circumstances of the case that the petitioner knew his employer had no right to act as he did and that he (petitioner) carried out his instructions knowing they were illegal. In other words, the Sub-Judge has presumed that the accused acted in bad faith and with knowledge of the illegality of the instructions he received from his employer. He relies upon two facts to arrive at this conclusion. One is that the petitioner was a relative of both Lakshminaranapa and the complainant, and the other is that he lived in another portion of the houses in dispute. We are of opinion that these premises do not uphold logically the conclusion of the Sub-Judge.

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Being a servant, the petitioner's *mala fides* and guilty knowledge should be positively and affirmatively proved and ought not be presumed. The mere fact that he was related and lived in the same house does not necessarily show that he knew the relative rights of the two disputing litigants. This finding of the Sub-Judge, based as it is upon no proof, ought not to be accepted. It follows that the conviction has no solid foundation to rest upon and must be set aside.

The offence does not fall within the rules respecting acts *mala in se.* Lord Abinger said:—"If a master told his servant to shoot a man, he would know that that was an order he ought to disobey. If a master having a doubt or no doubt of his own rights sets his servants to build a wall in a mine, they would, if he proved to have no right, be all liable to an action of trespass, but it would not be felony in the servants. If a man claims a right which he knows not to exist and he tells his servants to exercise it and they do so acting *bonâ fide,* I am of opinion that that is not a felony in them, even if in so doing they obstruct the airway of a mine. What I feel is this, that if these men acted *bonâ fide* in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within this Act of Parliament." (II Russell on Crimes, p. 893, 5th edition). We believe that under the Indian Penal Code the law is not different. Guilty knowledge or intention is an essential ingredient in the offence of mischief and when this is wanting, the conviction cannot be upheld. The servant acting *bonâ fide* did the act, not with the object or knowledge of caus-

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ing wrongful loss to the complainant or to speak more accurately, of diminishing the value of the utility of his property, but he did so to carry out what he honestly believed was the legal order of his superior.

It is unnecessary to consider the acts of Lakshminaranapa or the admissions made by him in any of his letters to the complainant, as he is not before us.

We direct that the conviction be set aside and the fines and fees levied from the petitioner be refunded to him. The Magistrate ought not to have mixed up the fines and the fees, the payment of which latter he ordered under the Court Fees Act.

Conviction quashed.

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CRIMINAL.

REVISION.

Before T. R. A. Thumboo Chetty, Chief Judge, and A. Ramachendra Iyer, Judge.

LINGAPAYA (COMPLAINANT) *v.* WADDAR HANUMA (ACCUSED).*

1892 April 2.

Dishonestly retaining stolen property—Penal Code (Act XLV of 1860) s. 411—Whipping Act (VI of 1864) s. 2—Words of description—Enhancement of sentence—Code of Criminal Procedure (Act X of 1882) s. 423 and s. 390—Sentence of whipping altered to rigorous imprisonment.

On appeal the District Magistrate altered a sentence of whipping for the offence of retaining stolen property under s. 411 Indian Penal Code, to one of rigorous imprisonment for one month, alleging as a reason that the prisoner was "not a juvenile, but a grown-up young man of twenty-three."

Held that the sentence of whipping was perfectly legal, as the Whipping Act authorises the punishment under it of adults as well as of juveniles and the case did not fall under any of the exceptions mentioned in the Code of Criminal Procedure s. 390.

Further, that the alteration of sentence to imprisonment from whipping is practically an enhancement, forbidden by the Code of Criminal Procedure, s. 423, and therefore illegal. *The Queen* v. *Banda Ali*(1) followed.

Semble, the words used in all the clauses of s. 2 of the Whipping Act (VI of 1864) are merely words of description and the offences punishable are those named in the sections of the Penal Code specified: therefore the offence of "retaining" stolen property can be punished by whipping although the Whipping Act s. 2 (7) specifies only "receiving."

* Criminal Revision No. 39 of 1892 of Order passed in Criminal Appeal No. 4 of 1892 by Mr. B. Tirumalacharry, District Magistrate of Chitaldroog, dated the 8th day of February 1892 against the sentence passed in Criminal Case No. 1 of 1892 by Mr. C. Subba Row, Second Class Magistrate of Chitaldroog, dated the 1st day of January 1892.

(1) 6 B. L. R. App. 96.

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The judgments of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) were as follows:—

RAMACHENDRA IYER, J.—The prisoner was convicted of an offence under s. 411 of the Penal Code and sentenced to receive twenty-four stripes with a rattan. On appeal the District Magistrate upheld the conviction but altered the sentence to one of rigorous imprisonment for a month, the reason assigned for the alteration being that the prisoner was "not a juvenile, but a grown-up young man aged twenty-three."

I called for the record, since the reason given by the District Magistrate for altering the sentence was not quite intelligible to me.

I gather from the record that the prisoner was convicted under s. 411 of the Penal Code of having retained stolen property. Section 2 of the Whipping Act empowers a criminal court to punish any person (an adult or a juvenile) with whipping in lieu of any punishment for the offence of dishonestly *receiving* stolen property. If the District Magistrate was of opinion that because the offence specified in s. 2 (7) of the Whipping Act is the dishonestly receiving stolen property, and that committed by the prisoner was dishonestly *retaining* stolen property, the sentence passed by the Subordinate Magistrate was illegal, he ought to have explicitly stated so in his judgment. If this distinction was not made by the judge, no exception could be taken to the legality of the sentence passed by the Subordinate Magistrate. I do not think that there is any foundation for the distinction which I have above sug-

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gested. On reading the different clauses of s. 2, it seems to me that the intention of the legislature was to describe certain offences as briefly as possible and to refer to the Penal Code for a full description of those offences. Sec. 2 (3) refers to a theft by a clerk or servant. I do not consider that it was intended to exclude a person who was not actually a clerk or servant, but who was employed in the capacity of a clerk or servant and who rendered himself liable to punishment under s. 381 of the Penal Code. Similarly s. 2 (4) which applies to theft after preparation for causing death or hurt, applies also to theft after preparation for causing restraint or fear of death.

I consider that the words used in all the clauses of the section are merely words of description, and that the offences punishable are the offences under those sections of the Penal Code which are specified in the section. I think that the sentence passed by the Subordinate Magistrate was perfectly legal.

Now the question arises, whether it was open to the District Magistrate to alter the sentence of whipping into one of rigorous imprisonment or, in other words, whether the sentence substituted by the District Magistrate was not an enhancement of the original sentence. The judgment of Dwarkanath Mitter, J. reported in *The Queen v. Banda Ali*(1) is very much in point:—

"I think that the appellate court is bound, under this section, to satisfy itself beyond all reasonable doubt, that the alteration which it proposes to make in the sentence of the lower court would not amount to

(1) 6 B. L. R. App., 96.

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an enhancement of the punishment already awarded by that court. If the alteration is restricted merely to the degree of the sentence, no difficulty whatever can possibly arise. But if, on the other hand, it goes to affect the nature of the sentence, as in the present case, the difficulty becomes almost insurmountable. Things dissimilar in nature do not admit of any direct comparison with one another; and if there is no fixed scale or standard by which the comparison can be made, the task must be given up as a hopeless one.

"The learned judge says, that a sentence of rigorous imprisonment for nine months is equivalent to one of rigorous imprisonment for six months, coupled with whipping. But from what materials this calculation has been made, I am wholly unable to make out. Granting that whipping is generally looked upon as a more degrading punishment than imprisonment, it does not necessarily follow that the substitution of rigorous imprisonment for whipping would not, under any circumstances, amount to enhancement of punishment. A poor wretch, who has got a large family to support, might prefer to be let off with a few stripes, instead of being incarcerated in jail for any lengthened period of time, and in his case at least the appellate court is bound to show satisfactorily that it is not really enhancing the punishment, before it undertakes to substitute the one punishment for the other without his consent.

"But be this as it may, it seems to be perfectly clear that the legislature has not supplied us with any data from which the comparative severity of the two sentences under our consideration can be determined;

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and it is therefore impossible to say how many strokes of the cat-o'-nine-tails would be equivalent to a sentence of rigorous imprisonment for a given period of time. It cannot be contended for one moment that each individual judge is at liberty, in a case of this kind, to act according to an arbitrary standard of his own. Every discretion vested in a court of justice must be exercised in a reasonable manner and upon reasonable grounds; and the power of altering the sentence, conferred upon the appellate court by the provisions of the section above quoted, is by no means an exception to this rule. If we hold with the learned judge that a sentence of twenty stripes is equivalent to one of rigorous imprisonment for three months, there seems to be no reason whatever why another judge should not be permitted to hold that the same sentence is equivalent to one of rigorous imprisonment for so many years. An appellate court can alter the sentence of the lower court, it is true, but if it is not in a position to say, upon some reasonable grounds, that the alteration which it proposes to make would not amount to enhancement of punishment, it is bound to reject that alteration as contrary to the express provisions of the law."

The reasoning of the learned judge appears conclusive to my mind and I have no hesitation in adopting his conclusion. I would quash the District Magistrate's order and restore the sentence passed by the Munsiff Magistrate.

THUMBOO CHETTY, C. J.—I am of the same opinion. Under s. 423 of the Criminal Procedure Code, it is competent for the appellate court to "alter the

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nature of the sentence, but not so as to enhance the same."

Under s. 390, when sentence of whipping is passed as a sole punishment, it has to be carried out at once by the Magistrate in communication with the medical officer, and in such cases, the result is, that the prisoner, after being whipped, is released forthwith and set at liberty. But where, as in this case, a long term of imprisonment is awarded in lieu of whipping, the prisoner's liberty is unduly interfered with and the substituted punishment is practically an enhancement of the sentence of whipping.

The reason assigned by the District Magistrate for awarding imprisonment in lieu of whipping is, that the accused is not a juvenile but a grown-up young man aged about 23 years. But, as pointed out by my learned colleague, s. 2 of the Whipping Act (VI of 1864) empowers a criminal court to punish any person (adult or juvenile) with whipping in lieu of any punishment to which he may be liable under the Indian Penal Code, for certain offences specified in the section, of which an offence under s. 411 is one, the only persons exempt from the punishment of whipping under s. 393 Criminal Procedure being—

(*a*) females;

(*b*) males sentenced to death, or to transportation, or to penal servitude, or to imprisonment for more than five years;

(*c*) males whom the court considers to be more than forty-five years of age.

For the foregoing reasons, I am of opinion that the sentence of whipping passed on the accused was a perfectly legal sentence and the District Magistrate

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ought not to have interfered with it on the ground alleged in his judgment.

The accused having undergone one month's rigorous imprisonment awarded by the District Magistrate, it would be cruel to inflict whipping by restoring the sentence of the Munsiff Magistrate. I would therefore simply return the record, pointing out the illegality of the sentence passed by the District Magistrate.

Order of Appellate Court quashed.

Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1892 *April* 2.

GOVERNMENT *v.* LINEN (ACCUSED).*

Railway Act (IV of 1879) ss. 25, 26 and 46—Engine-driver leaving his post—Breach of duty—Jurisdiction of Magistrate.

An engine-driver left his train at B Station and did not get into the train again till it reached R Station. He was charged under sec. 46 of the Railway Act (IV of 1879) and found guilty under sec. 26 (c) of the same Act by a Second-Class Magistrate.

Held, that the offence of the accused came under section 25 of the Railway Act and was properly triable by the Second-Class Magistrate.

The facts of the case appear sufficiently for the purposes of this report from the judgments of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) which were as follows :—

RAMACHENDRA IYER, J.—The accused, who was a driver in charge of the engine at Bidarkere station, and was absent from his post till the train reached Rampur station, was charged with an offence under *s.* 46 of the Railway Act (IV of 1879). The Subor-

* Criminal Revision No. 23 of 1892, on reference by Mr. H. H. Sparkes, District Magistrate of Kadur from the judgment in Criminal Case No. 2 of 1891 of Mr. R. Madhva Rao, Second-Class Magistrate of Arsikere, dated the 21st day of November 1891.

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dinate Magistrate of Arsikere found him guilty of an offence under *s.* 26 of the Act, and sentenced him to pay a fine of Rs. 50.

The District Magistrate was of opinion that an offence under *s.* 26, being punishable with imprisonment which may extend to three years, the Second-Class Magistrate of Arsikere had no power to take cognizance of the complaint. He was further of opinion that the accused ought to have been convicted under *s.* 46 of the Act.

I am of opinion that the accused was not guilty of an offence under either *s.* 46 or *s.* 26, but that he ought to be convicted under *s.* 25. Chapter V of the Act classifies offences under three heads. The first division embraces Offences by the Railway Administration; the second, Offences by Railway Servants; and the third, Offences by Persons Generally. Inasmuch as division (B.) of the Chapter specifically provides for the punishment of offences committed by Railway Servants, the accused, who was a guard, ought to be dealt with in accordance with those provisions and not under *s.* 46, which is one of the sections in the third division.

The point for determination is, under which of the sections in division (B.) the accused ought to be convicted. Section 26 subjects a driver to punishment if, *in the discharge of his duty*, he endangers the safety of any person by any rash or negligent act or omission. The complaint against the accused was not that he did anything rashly or negligently, while he was discharging his duty, but that he absented himself from the post of duty. If an engine-driver is in charge of the engine and, while doing his work,

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omits to exercise that circumspection and care which are expected of him and thereby endangers the safety of any person, he is liable to punishment under s. 26. But if he quits his post and neglects to do his work, it seems to me that he is guilty under *s.* 25. An offence under *s.* 25 being triable by a Second-Class Magistrate, the question of jurisdiction does not arise in this case.

THUMBOO CHETTY, C. J.—I also think that the offence falls under *s.* 25 of the Railway Act (IV of 1879). The accused was bound to remain on the engine and to perform his duty as driver till the train reached its destination. He got down at an intermediate station and was absent from his post till the train passed to another station. There has thus been an omission of a clear, legal duty and there was also negligence or heedlessness on the part of the accused; and such omission of duty was also likely to endanger the safety of the passengers in the train, because the accused left the engine to be driven by a fireman, whose improper performance of the duty of driver might have brought about an accident. The case clearly falls under the last clause of *s.* 25, which provides a punishment of imprisonment for a term which may extend to one year, or of fine, or both. The Second-Class Magistrate was competent to try the offence. The conviction will be altered accordingly, and the sentence will remain unaltered.

Neither *s.* 26 nor *s.* 46 applies to this case, for the reasons stated by my colleague.

Conviction altered accordingly. Sentence affirmed.

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Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 *March* 28.

GOVERNMENT *v.* KALA AND 2 OTHERS (ACCUSED).*

Penal Code, ss. 353 and 441—Forest Rules, s. 11(40)—Cattle Trespass Act (I of 1871) s. 24—Separate complaint and trial for various offences committed at the same time—Previous discharge—Bar to subsequent proceedings—Powers of Court of Revision—Conversion of acquittal into conviction—Code of Criminal Procedure, ss. 235, 403, 439.

The accused had committed several offences against the Penal Code, the Cattle Trespass Act and the Forest Rules. They had been tried and discharged on complaint for the offences under the Penal Code (*ss.* 353 and 441) and were subsequently tried and convicted by another Magistrate for the offences under the Cattle Trespass Act and Forest Rules. On Appeal their conviction was set aside, the Appellate Court holding their previous discharge to be a bar to the subsequent proceedings.

On reference by the District Magistrate from this appellate order, it was *held* by the Chief Court that, an o der of discharge not being equivalent to an acquittal (Code of Criminal Procedure, *s.* 403 Explanation) and the offences being moreover separate and distinct (Code of Criminal Procedure, *s.* 403, second paragraph), the previous order was no bar to the subsequent trial: and that the last paragraph of *s.* 439 of the Code of Criminal Procedure does not prevent a court of revision from setting aside the order of acquittal and directing a new trial, such course not being tantamount to the conversion of an acquittal into a conviction.

The District Magistrate of Bangalore being of opinion that the Town Magistrate had on appeal wrongly acquitted the accused of charges made under the Cattle Trespass Act and the Forest Rules because they had been discharged on a previous trial for offences committed at the same time under the Penal Code, referred the case to the Chief Court for revision. The order of reference was as follows :—

* Criminal Revision No. 35 of 1892, on reference by Mr. V. P. Madhva Rao, District Magistrate of Bangalore, dated the 9th day of February 1892 from judgment in Criminal Appeal No. 13 of 1891 of Mr. G. Ranganatha Rao, Town Magistrate of Bangalore dated the 21st day of December 1891.

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The appellants were charged by the complainant Keswachar, a forester, bef re the Amildar Magistrate of Doddaballapur with the offences of grazing cattle in the State Forest and rescuing the cattle while on the way to the pound.

The Third-Class Magistrate convicted accused No. 1 under *s.* 11 (40) of the Forest Rules and sentenced him to pay a fine of Rs. 10 and convicted the other accused under *s.* 24 of the Cattle Trespass Act, and sentenced them to pay a fine of Rs. 15 and Rs. 5 respectively.

Against the said conviction, the accused preferred an appeal, which was referred to the Town Magistrate, who reversed the conviction of the lower court on the ground that the appellants had been once tried for the same offence and discharged by the First-Class Magistrate.

The view taken by the Appellate Magistrate appears to be erroneous.

The offence tried by the First-Class Magistrate against the appellants was not the same, but a different one, viz., causing hurt, punishable under the Penal Code.

The proceedings in both the cases are herewith submitted for the orders of the Chief Court.

The judgments of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) were as follows:—

RAMACHENDRA IYER, J.—The three accused persons were charged, before the General Assistant Commissioner of Bangalore, with having committed offences punishable under *ss.* 353 and 441 of the Penal Code. The facts alleged in the complaint showed that the accused persons had committed other offences also, *viz.*, under the Forest Rules and the Cattle Trespass Act. But the Assistant Commissioner did not enquire into that case and passed no orders thereon, apparently because a separate complaint made in respect of the said offences was then pending before the Amildar Magistrate. Some time after the accused persons were discharged by the Assistant Commissioner, they were tried by the Amildar Magistrate and convicted under *s.* 11 of

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the Forest Rules and *s.* 24 of the Cattle Trespass Act. They appealed against the conviction and sentence and the Town Magistrate of Bangalore, who heard the appeal, quashed the conviction, on the ground that the order of discharge made by the Assistant Commissioner was a bar to the subsequent proceedings taken before the Amildar.

The Town Magistrate did not quote the section of the Criminal Procedure Code which rendered the trial by the Amildar illegal. It may be assumed that he had *s.* 403 of the Code of Criminal Procedure before him when he directed the acquittal of the appellants. Under that section a trial must have ended in an acquittal or a conviction, if it is to be pleaded in bar of subsequent proceedings. An order of discharge not being an acquittal for the purposes of the section (*vide* Explanation), it is manifest that there was no previous acquittal at all.

The second paragraph of the section enacts further that "a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial, under s. 235, paragraph one." Now, upon the facts stated by the prosecutor, the accused persons might have been charged with offences under the Penal Code, the Forest Rules, and the Cattle Trespass Act. Since the General Assistant Commissioner chose to take cognizance of offences under the Penal Code alone, the Amildar was right in trying the accused for offences committed under the special Acts, even if it be assumed that the order of discharge was tantamount to an acquittal.

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There is only one point more for consideration *viz.*, whether we, as a Court of Revision, have power to set aside an order of acquittal. The answer to this question depends upon the construction of the last para of *s.* 439 of the Criminal Procedure Code, which is as follows :—"Nothing in this section shall be deemed to authorize the Chief Court to convert a finding of acquittal into one of conviction." This means that the Court of Revision shall not quash an acquittal, and convict a man and sentence him to punishment. If the order of the court is simply to quash an erroneous order made by a subordinate court and to direct that court to hold a further enquiry or to try a case *de novo*, or to hear an appeal on the merits, it is not "converting a finding of acquittal into a finding of conviction." I am of opinion that we have power to interfere in the case. I would quash the Town Magistrate's order, and direct him to hear the appeal.

KRISHNA MURTI, J.—I agree.

Order of appellate court set aside. Appeal to be reheard.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 *August* 29.

GOVERNMENT *v.* LINGANA AND THREE OTHERS (ACCUSED).*

Code of Criminal Procedure (Act X of 1882), ss. 236, 237, 238—Penal Code (Act XLV of 1860), ss. 352 & 451—Alteration of finding—Enhancement of sentence—New trial.

A conviction under s. 352 of the Penal Code with sentence of fine was altered by the District Magistrate to a conviction under s. 451

* Criminal Revision No. 179 of 1892, from the judgment in Criminal Appeal No. 24 of 1892 of Mr. B. K. Venkatavardan Iyengar, District Magistrate of Tumkur, against the finding and sentence of Mr. Sreekunthia, Third-class Magistrate of Gubbi Taluk in Criminal Case No. 46 of 1892 dated the 5th day of May 1892.

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of the Penal Code and a nominal sentence of imprisonment (one minute) was super-added.

Held that the alteration amounted to enhancement of sentence and could not be upheld. Where the actual offence is more serious than the Lower Court has found but does not form a species of that offence such as is contemplated by ss. 236, 237 and 238 of the Code of Criminal Procedure, the proper procedure is to order a new trial. The offences under s. 352 and s. 451 of the Penal Code are altogether different; the former being a compoundable summons case and the latter a non-compoundable warrant case.

The appellate order of the District Magistrate from which this revision was preferred was as follows:—

The appellants have been convicted of the offence of assault under s. 352 of the Indian Penal Code.

The 1st and 2nd appellants have been sentenced to pay a fine of Rs. 30 each or in default to undergo rigorous imprisonment for five days each, and the 3rd and 4th have been sentenced to pay a fine of Rs 10 each or in default to suffer similar imprisonment for three days each. They have also been ordered to pay the costs incurred on account of process fees, &c., Rs. 2-12-0.

The complaint is that the 1st, 2nd and 3rd appellants went to the complainant's house, and asked him why he had complained against some of them including their master, dragged him out, beat him with their fists and also got the 4th appellant, who is a holiyar, to similarly assault him.

The appellants pleaded not guilty and said that this complaint was lodged because they were witnesses against the complainant in another case.

Beyond this they had nothing to say nor any evidence to offer.

The Amildar Magistrate believed the prosecution and convicted the appellants. No grounds are given to discredit the witnesses for the prosecution. I therefore agree with the finding of the lower court.

As for the question of jurisdiction, the appellants' advocate thought this was a case under s. 452 of the Indian Penal Code and therefore beyond the jurisdiction of the lower court. I think that s. 451 of the Indian Penal Code is applicable and that it does not place the case beyond the jurisdiction of a Third-class Magistrate, I alter the conviction to one under the latter section and dismiss the appeal. According to that section imprisonment is a

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necessary punishment. So I record a nominal sentence of imprisonment for one minute.

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The accused applied to the Chief Court on revision.

Mr. *K. T. Narasima Iyengar* for the accused.

No one appeared on behalf of Government, although the Court had served notice upon the Assistant Government Advocate.

The judgment of the Chief Court (RAMACHENDRA IYER and KRISTNA MURTI, JJ.) was as follows:—

The imprisonment which the District Magistrate has awarded does in effect enhance the sentence, and his order cannot therefore be supported as far as this part of it is concerned. The legislature, in laying down the mode of punishment intends that the courts should give proper effect to it. The sentence which the District Magistrate has seen fit to award looks more like evading the rule than carrying it out. Such frivolous treatment of a provision of the law cannot be viewed with approbation.

Regarding the alteration of the finding, it seems to us that when the appellate court considers that the facts proved establish a more serious offence than what the lower court has found to have been committed, and such offence does not form a species of that offence, such as is contemplated by ss. 236, 237 and 238 of the Criminal Procedure Code, the proper course is to order a new trial. Otherwise, the accused persons may be seriously prejudiced when, as in this case, the conviction under s. 352 of the Indian Penal Code has been altered to one under s. 451 of the same Code without an opportunity being given to the accused persons to defend themselves under the latter section. The offences are alto-

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gether different. The one under s. 352 is compoundable and may be tried as summons case, while that under s. 451 is not compoundable and must be tried as a warrant case.

For these reasons, the order of the District Magistrate cannot be supported.

Order of lower appellate court set aside.

APPELLATE CRIMINAL.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1892 *March* 14.

GOVERNMENT *v.* NANJA AND ANOTHER (ACCUSED).*

Falsus in uno, falsus in omnibus—Proof—Preponderance of evidence—Doubt—Accused entitled to benefit of reasonable doubt.

The accused were charged with wrongful confinement and extortion. The Magistrate disbelieved the evidence as to extortion, but convicted on the charge of wrongful confinement.

Held, by the Full Bench (KRISHNA MURTI, J. dissenting), that the case exhibiting a reasonable doubt, the accused should receive the benefit of it and be acquitted.

Per THUMBOO CHETTY, C. J.—Neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient for a verdict of condemnation, unless it generates full belief of the fact to the exclusion of all reasonable doubt. Although the maxim *Falsus in uno falsus in omnibus* is not of general application and inapplicable where the misrepresentation of a witness has resulted from mistake or infirmity and not from design and his honesty remains otherwise unimpeached, yet it has full force where, as in the present case, the narrative as to robbery is shown by the Magistrate to have been made with deliberate perjury and from a sinister motive and the alleged circumstances are so related and connected with those of the wrongful confinement that little or no reliance can be placed on the statements of the witnesses as to the

* Criminal Appeals Nos. 6 and 7 of 1892, against the finding and sentence in Criminal Case No. 6 of 1891 of Mr .A. Raghavendra Rao, First Class Magistrate of Tumkur District, dated the 8th day of January 1892.

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latter, which is said to have formed part of the same series of acts as the robbery.

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Per KRISHNA MURTI, J.—The evidence has been properly appreciated by the lower court and the conviction must be upheld. It is not correct to argue that because a part of the case was disbelieved the rest also should be rejected as false. The punishment is inadequate, but cannot be interfered with by the court sitting in appeal.

The accused were charged with having wrongfully confined the complainant in their house and under threats then and there extorted certain jewellery from her. The Magistrate disbelieved the evidence of the complainant on the charge of extortion and acquitted the accused of that offence; but found them guilty and sentenced them for the alleged illegal confinement.

The two accused preferred appeals to the Chief Court.

Appellants Nos. 1 and 2 in person.

Assistant Government Advocate for the Government.

The Full Bench of the Chief Court (THUMBOO CHETTY, C. J., RAMACHENDRA IYER and KRISTNA MURTI, JJ.) delivered the following judgments:—

KRISHNA MURTI, J.—I have carefully considered this case and come to the conclusion that the evidence has been properly appreciated by the lower court and that the conviction appealed against must be upheld.

The case presented by the prosecution is, that accused No. 2, who is an ostensible trader in clothes, decoyed the complainant into his house, under the pretence of showing her some bodices which he had for sale, and when she was there, he, with the

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help of accused No. 1, confined her for a few hours and extorted some property from her.

The Magistrate disbelieved that part of the case which related to the extortion and the subsequent restoration of the jewels, and I do not feel called upon to say anything regarding it. But it seems to me that it is not quite correct to argue that, because a part of the case was disbelieved the rest also should be rejected as false. The fact which weighed much with the Magistrate was that, if the robbery had really taken place, the complainant, as a sensible woman, would not have omitted to have gone to the Police station which was close by and applied for an immediate search of the prisoners' house. Although in theory the course suggested is no doubt what a prudent man ought to have adopted, yet it seems to me that the inference drawn from the omission overlooks many of the practical difficulties which would have rendered the immediate seizure of the property by the police well nigh impossible. In the first place, an officer authorized to conduct a search must have been found in the station. Next, he must have attended to the requisition of the complainant promptly. Thirdly, he must have lost no time in writing reports, &c., before repairing to the prisoners' house. Lastly, the prisoners, and there were two of them, must have remained quiet without running away anywhere and disposing of the property otherwise than by keeping it in their own house. Taking these contingencies into consideration, it happens not unfrequently that people who are robbed of property try to recover it first and then give information of their loss to the Police. In this case, the complainant is a woman who was living

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as a subordinate member with her brother, and it is not unnatural that she preferred to consult him before taking any independent action herself. It does seem rather odd that, when she went home, she did not inform her brother of the theft at once. This conduct cannot be easily explained unless perhaps the complainant hoped to obtain a restoration of the property and thus conceal her mishap altogether from her brother, as, even for returning home late, she was angrily expostulated with. The prisoners were her acquaintances, and she believed it was for money that they seized her jewels. In spite of her, information reached her brother and the sequel of the story followed. There is nothing improbable in this part of the case, and merely because the Magistrate did not believe it, I fail to see how the first part of the case, which only is now before us, can be rejected as false.

Even the prisoners do not suggest why the complainant should concoct this case against them. If accused No. 2 incurred the odium of Nanabars for keeping a Nanabar woman, why should Nanja, accused No. 1, if innocent, be implicated with him? Even when implicated, why should Nanja confess the crime both before the Munsiff and the Magistrate? These questions admit of only one answer, that the case against the prisoners is true. Witness Chenaverama states that she was alarmed, because the rumour about this theft got abroad, and it was she that went and asked the complainant's brother about it. This fact negatives the hypothesis that the complainant would have resorted to this dodge to retain for herself the jewels which she

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had borrowed. Neither she nor her witnesses are said to have any bad motive against the prisoners. They have given their evidence in a consistent and straightforward manner and it is not right to reject their testimony arbitrarily as being false. At all events, I am not prepared to say that the Magistrate was wrong in giving credence to this evidence. He has written an elaborate judgment in which he has described the evidence at great length and it is unnecessary to recapitulate all that he has written. I have so far considered the objections to which the conclusions arrived at by the Magistrate appear liable and the remarks I have made seem sufficient to explain them away.

I would uphold the conviction.

The punishment is very inadequate, but, sitting as we do as an appellate court, it cannot be interfered with. I would therefore dismiss this appeal.

Ramachendra Iyer, J.—The appellants were convicted of having wrongfully confined one Hutty for the purpose of extorting property and each of them was sentenced to three months' rigorous imprisonment and a fine of Rs. 10.

The case of the prosecutrix was that both the prisoners came one noon to her house and invited her to the house of prisoner No. 2 promising to sell *ravikays* to her. She went to their village and first went to see a woman with whom she had to transact some business. She then stepped into the house of prisoner No. 2. Some time afterwards, another man came there and remained for a short time. Then prisoner No. 1 appeared and he was chatting for some time. He then took a lock and left the house leaving her

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and prisoner No. 2 alone in the room and locked the outer door. Prisoner No. 2 called on her to give up her jewels, and threatened personal violence if she failed to comply. She implored him to spare her life and parted with her bangles. He thereupon directed prisoner No. 1, who was standing outside, to open the door and let her go. She went home that night and the next day she got her jewels back through the intercession of a friend on payment of Rs. 10 to prisoner No. 2.

The prisoners are residents of a village which adjoins that of the complainant and she was well known to them; for she used to visit their village selling curds and milk. The houses of the prisoners were not the only houses in their village. The time chosen for the perpetration of the offence was an afternoon. It seems to me a very improbable story that two men who had known the complainant should have combined to confine her in broad daylight in a house which was surrounded by other houses for the purpose of extorting property.

The complainant assures us that, when she was wrongfully confined, she could see two neighbours through a slit in the door; and that, when prisoner No. 2 cried out to No. 1 that he might permit the woman to return home, she came out and saw the said neighbours and acquaintances standing there. All that I need say on this part of the case is, that it is still more improbable that the prisoners should have committed such a daring outrage almost in the very presence of their neighbours and that prisoner No. 2 should have proclaimed his offence by bawling out from his room to prisoner No. 1 to open the door

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and let the woman return home. The 5th witness's house was separated from that of prisoner No. 2 by a single wall, and that witness was in his house and yet he did not hear the complainant's cry.

When there were so many villagers and also a police-station close at hand and when prisoner No. 2 who extorted the jewel was still in his house with the jewel in his possession, one would suppose that an outcry would have been immediately made and the jewel got back. Not only did the prosecutrix make no outcry, but, when she went home and her brother, under whose protection she lived, asked her why she was late, she simply replied that business had detained her.

I do not consider it necessary to analyse the evidence further, as the inconsistent and halting judgment of the Magistrate shows that even he was not strongly impressed by the evidence adduced by the prosecution. I do not believe a word of what the prosecutrix has deposed and I have no hesitation in quashing the conviction and directing the release of the prisoners.

THUMBOO CHETTY, C. J.—The appeal in this case first came up before me as admission judge. I called for and perused the proceedings. As I entertained a doubt as to the propriety of the conviction, I suspended the sentence and directed the appeal to be posted for hearing before a Division Bench.

My learned colleagues, who heard the appeal, were divided in opinion and, under s. 429 of the Code of Criminal Procedure they have referred the case for my opinion.

Having again perused the proceedings, and having

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had the advantage of reading the judgments of my learned colleagues, I must confess that the case is not altogether free from doubt and that the appellants are entitled to the benefit of that doubt.

As remarked by Starkie in his excellent treatise on Evidence, "the distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose, unless it generates full belief of the fact to the exclusion of all reasonable doubt."

That this case is not free from all reasonable doubt is quite clear from what is stated in the judgments of my colleagues.

The accused were charged with having committed robbery and wrongful confinement; offences falling under ss. 392 and 347, Indian Penal Code. The Magistrate disbelieved the evidence adduced for the prosecution in respect of the first charge.

He says :—

"Of the two offences with which the police have charged the accused, I consider the one of robbery under s. 392 has not been substantiated by satisfactory evidence, because it is only the first witness who has stated that accused No. 2 extorted from her the ornaments she wore in her ears by using threats and criminal force; even accused No. 1 has not been an eye-witness of such extortion; the conduct, moreover, of the first witness, after her release from the house in which she is stated to have been confin-

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ed, and also of the other witnesses for the prosecution, in not reporting the occurrence immediately to the police-station, which was close to the scene of the occurrence, and taking legal steps to have the houses of accused No. 2 and of his kept woman searched in due course and to recover the property alleged to have been extorted, makes it highly incredible, that there could have been any extortion. The first witness having waited to make her complaint till she recovered the lost property from accused No. 2 by paying him an amount which he demanded and her having got it in the house of the second witness in his house only, appears to me still more incredible."

Although the maxim "falsus in uno falsus in omnibus" (that a witness who gives false testimony as to one particular cannot be credited as to any) is not of general application, yet, in this case, it must be observed that the charge of robbery was deliberately made and the alleged circumstances were so related as to induce the Magistrate to think that the complainant and her witnesses designedly gave false evidence and misrepresented wilfully and with a sinister motive. If the misrepresentation made by a witness has resulted from mistake or infirmity, and not from design, and his honesty otherwise remains unimpeached, then the legal maxim quoted above need not be applied so as to totally reject the whole evidence given by a witness. But in this case, the narrative as to robbery is clearly shown by the Magistrate to be improbable and unreliable. The witnesses manifestly appear to have wilfully perjured themselves in deposing to certain alleged facts which

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were known to be false, and little or no reliance can therefore be placed on what they have stated with regard to the wrongful confinement (for the purpose of extorting certain jewels) which is said to have formed part of the same series of acts as the robbery.

It is admitted that accused No. 2 has got many enemies in the village, and the alleged confession of accused No. 1 appears to be, as stated by accused No. 2, the result of a conspiracy formed against him.

That complainant should have raised no alarm immediately after she was out of her alleged confinement and should have abstained from making any complaint to the police-station that was close by and concealed what happened to her from her own brother, even when questioned, are circumstances which are quite unfavorable to the prosecution.

I share in the doubts expressed by my brother RAMACHENDRA IYER and, disbelieving wholly the case for the prosecution, I would set aside the conviction and sentence in the case of both the appellants and direct their immediate release.

Convictions set aside.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

GOVERNMENT *v.* HANUMANTHA*.

1892 *June* 15.

Appeal by Government—Limitation Act (XV of 1877), Sch. II, Art. 157 and s. 5 cl. 2—Practice—Government required to exercise the same diligence as any other party—Inability to obtain original record no excuse.

The Government preferred an appeal against an acquittal more than six months after the judgment (Limitation Act, No. XV of

* Criminal Appeal No. 59 of 1892, against Judgment of acquittal No. 5 of 1891 of the Sessions Judge of Nagar (Chittaldroog Sessions).

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1877 Sch. II. Art. 157); and sought exemption under s. 5 cl. 2 of the same Act, on the ground that the record was not available for submission to the Government Advocate, being detained in another court. It was also urged that the practice of the Chief Court hitherto had been to accept this as sufficient excuse.

Held, that the Government or the District Magistrate must exercise the same diligence as any other party and any delay or inability on the part of criminal courts to send the original record will not *per se* constitute a sufficient cause under s. 5 of the Limitation Act to bring an appeal beyond the period presented by the Act. Copies ought to have been obtained or the Government Advocate instructed to peruse the record and thereon advise the Government. As however it appeared that in previous cases such delays had been condoned by the court and a refusal to admit the present appeal without due warning might work injustice, the appeal was admitted although the practice referred to could not be justified on legal grounds.

On the merits, the court, having reviewed the evidence which it had previously dealt with in Criminal Appeals Nos. 85 and 88 of 1891, dismissed the appeal.

The facts of the case appear sufficiently for the purposes of this report in the judgment of the Chief Court (THUMBOO CHETTY, C. J. and P. N. KRISHNA MURTI, J.) which was as follows:—

This is an appeal preferred, under the orders of Government, by the Assistant Government Advocate, under s. 417 of the Code of Criminal Procedure, against a finding of acquittal passed by the Sessions Judge of Nagar. The prisoner Hanumantha, who was one of five tried by the Sessions Judge for murder committed in dacoity under s. 396 of the Indian Penal Code, and for dishonestly receiving and retaining stolen property knowing that such property had been obtained by means of dacoity under s. 412 of the same Code, was acquitted of both charges on the 17th June 1891. This appeal was not lodged till the 9th April 1892, that is to say, long after

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the period of six months provided by article 157 of the second schedule of the Limitation Act had expired. The first question which we have to determine is, whether under clause 2 of s. 5 of the Limitation Act, the appellant has satisfied the court that he had sufficient cause for not presenting the appeal within the period of limitation above-mentioned.

The Assistant Government Advocate has filed copies of the District Magistrate's application to the Sessions Judge for the record sent to him. The first of these applications is dated the 17th June 1891, which is the same day as that on which the Sessions Judge passed the order of acquittal. To this reference the Sessions Judge replied in his No. 613 of the 25th June, that the record could not be sent to him as the same had been forwarded to the Chief Court. Nothing was done by the District Magistrate till the 28th December, on which day he renewed his application for the record and this was followed up by a reminder dated the 12th of January 1892. The Sessions Judge despatched the record on the 12th February 1892 and after the necessary correspondence with the Government this appeal was filed, as already mentioned, on the 4th April. In the interval, an appeal had been presented by the convicted prisoners, which appeal was disposed of by the Chief Court on the 26th October 1891. This was perhaps the cause of delay in the transmission of the record to the District Magistrate and the Assistant Government Advocate urges that the period taken up in obtaining the record should be deducted and, if this is done, he points out that the appeal is within time.

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We are not quite convinced of the soundness of the argument thus urged on our consideration. When the District Magistrate was informed in reply to his first application that the record could not be spared, it was his plain duty to have obtained copies in the usual course and taken the necessary action in consultation with the Government and the Government Advocate. His omission to do a plain duty cannot relieve him from the disability imposed upon him by law and on this ground alone we feel that we are not justified in deeming the delay sufficiently explained under s. 5 of the Limitation Act. Copies ought to have been obtained or the Government Advocate might have been instructed to peruse the record in the Chief Court and advise the Government on the action to be taken. But the Assistant Government Advocate points out that it has been the practice heretofore to wait for the receipt of the record and then take further action. We find that in one or two cases such delays have been condoned by this Court, but we are of opinion that it is not right that we should allow any extension of time on insufficient grounds. As however our refusal to admit this appeal without a due warning that the practice referred to cannot be justified on legal grounds, may work injustice in this case, we have resolved to admit it, but in doing so, we must lay down distinctly the law that in the matter of obtaining the record or copy thereof the District Magistrate or the Government is expected to exercise due diligence the same as any other party, and any delay or inability on the part of criminal courts to send the original record will not *per se* constitute a sufficient

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cause under s. 5 of the Limitation Act to bring an appeal beyond the period prescribed therefor by that Act.

Coming now to the merits of the case, we called upon the Assistant Government Advocate to say distinctly which of the two charges he pressed in this appeal and he confined himself to the one under s. 412 of the Indian Penal Code. There was nothing specifically said about this in the appeal petition.

We deem it unnecessary to narrate a history of this case as it will be found in the judgment of this court in Criminal Appeals Nos. 85 and 88 of 1891. For the reasons given there and which apply to this case with all their force, we refuse to act upon the contradictory and conflicting confessions of some of the prisoners. It follows that there is no evidence at all to show that there has been a dacoity or that this man took part in it. If his complicity could in any manner be made out at all, we are disposed to think that no more serious offence can be attributed to him than what the other prisoners were convicted of. This offence is receiving and retaining stolen property with dishonest intention and knowledge under s. 411 of the Indian Penal Code.

We shall briefly discuss the evidence on this point, but, before doing so, must premise that the learned Sessions Judge is not shown to have omitted from consideration any salient evidence or to have made a mistake in understanding of facts or in drawing legal inferences from them. In short he does not seem to have erred in appreciating the evidence and after considering it carefully we have come to the

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conclusion that we cannot go beyond him and say more than that the case against Hanumantha is, if any exists at all, very doubtful.

Having then analysed the evidence referring to the accused, Hanumantha, the Court concluded—

On the whole we, sitting as a Court of Appeal, are of opinion that sufficient grounds have not been made out to induce us to dissent from the finding of the Sessions Judge or to disturb it. We dismiss this appeal.

Appeal dismissed.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1892 *June* 15.

GOVERNMENT *v.* VENCATARAMIA.*

Penal Code (Act XLV of 1860), s. 504—Abuse—Intention—Breach of the peace.

Held, that an altercation in words of an ordinary nature not such as to cause insult or provocation likely to induce the complainant to commit a breach of the peace is not an offence under s. 504 of the Indian Penal Code.

Per KRISHNA MURTI, J.—Knowledge or intention is a necessary ingredient of an offence under s. 504 Indian Penal Code and where the accused is not shown to have a knowledge or intention to commit a breach of the peace his conviction is bad in law.

Per THUMBOO CHETTY, C. J.—It is not necessary there should be an actual breach of the peace to bring the offence under s. 504 of the Indian Penal Code. It is sufficient if the language used was such as was likely to cause the person insulted to break the peace.

The facts appear sufficiently in the judgments of the Chief Court (THUMBOO CHETTY, C.J., and KRISHNA MURTI, J.) which were as follows:—

KRISHNA MURTI, J.—I have considered the evi-

* Criminal Appeal No. 63 of 1892, against the finding and sentence in Criminal Case No. 10 of 1892 of Mr. A. Coopoosawmy, General Assistant Commissioner and First Class Magistrate of Kolar District, dated the 19th day of March 1892.

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dence in this case and am of opinion that the conviction ought not to be upheld. The charge is very defectively worded inasmuch as it does not specify the place where the offence occurred and does not set out the knowledge or intention which is a necessary ingredient in an offence under s. 504 of the Indian Penal Code. In a somewhat analogous case(1) to the present one, PLUMER, C. J., remarked upon a similar defect in the charge as pointed out above and refused to presume intention or knowledge that the public peace would be broken when three oddars abused and insulted a woman. In another case(2) the same learned Judge and Mr. Justice RAMACHENDRA IYER held that the conviction was bad in law as the magistrate did not find that there was any intention to cause a breach of the peace and the mere use of words of vulgar abuse was not punishable. They quashed the conviction.

In this case the magistrate does not find any such intention or knowledge in any part of his judgment. All that he says is that the accused made use of filthy and provoking language towards the complainant. The words of s. 504 of the Indian Penal Code are "whoever intentionally insults and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace." As the result has shown there was no breach of the public peace in this case. The person insulted was a Brahmin woman in her monthly sickness. When she was attacked she helplessly ran in and shut the door of the house.

(1) Criminal Revision No. 177 of 1883. *See* Appendix.
(2) Criminal Revision No. 172 of 1885. *See* Appendix.

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The facts are incompatible with a presumption that the accused person was unaware of the complainant's helpless condition or that he knew or intended that she would cause a breach of the public peace. The whole affair was nothing more than a private brawl between the parties and the intention to create a breach of the public peace was as far away from the complainant as it was from the accused. In the absence of such an intention or knowledge which has not been set out by the magistrate in the charge and has not been found by him as a matter of fact in his judgment, I am of opinion that the conviction is bad in law and must be set aside.

On the merits also I think the complainant has not proved her case. As admitted by the magistrate she has greatly exaggerated the case. There is a great discrepancy between what she and her husband stated to the police and their evidence given before the magistrate. As stated by the magistrate in his judgment, the witnesses are not at all disinterested, since some of them had opposed the appointment of the accused some years back as patel of the village. Just before this altercation the patel interfered to keep the drinking water pure. The magistrate has refused to believe the female witnesses on the ground that they are more or less under the control of other witnesses who are their male relatives. He does not think that the accused made use of any statement intending thereby to really affect her virtue and respectability. He does not believe that the accused insulted the complainant by exposing himself. Thus denuded of all exaggeration, the substratum of truth, if any, does not go beyond the

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utterance of some abusive words. Their grossness cannot be judged from a high standard of refinement as the parties with whom we are dealing are addicted to the utterance of filthy words in their ordinary coversation. On the whole I am not prepared to find that grossly abusive language was used.

I would set aside the conviction and sentence and direct the fine if recovered to be refunded to the appellant. It follows that the order under s. 106 of the Code of Criminal Procedure will also be set aside.

THUMBOO CHETTY, C. J.—The two cases quoted by my learned colleague are I think distinguishable from the present. In Criminal Revision No. 177 of 1883 it was found that the abusive language was used by the accused not to insult or provoke a breach of the peace but to cause complainant to give them ragi which they alleged was due to them. In the other case, Criminal Revision No. 172 of 1885, the accused (a female) abused the complainant standing at the door-way of her own house, and the magistrate did not find there was any intent to cause a public breach of the peace.

In the present case the altercation took place in a public street and if there was actual use of filthy and abusive language and imputation of unchastity, the complainant who was a Brahmin married woman, would certainly have felt the insulting and abusive language very keenly and there might have been a breach of the peace, owing to the provocation caused by the abusive and defamatory language said to have been made use of by the accused. In such cases, if the provocation caused was such as was likely to cause the person insulted to break the peace the

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offence would fall under s. 504. It is not necessary that there should be actually a breach of the peace.

Now as to the merits of this case, I agree with my colleague in thinking, that the magistrate's own finding shows that the complainant has grossly exaggerated what took place and that the altercation in words between the complainant and the accused was of an ordinary nature, and cannot be regarded as an offence falling within the purview of s. 504.

The accused was summoned to answer a charge of defamation under s. 500 Indian Penal Code, because it was alleged that the accused defamed her by saying that she had illicit intercourse with several persons, but it is not clear why that charge was not proceeded with and, in lieu thereof, a charge under s. 504 was framed. The finding of the Magistrate recorded in para 9 of his judgment is as follows:—

"The witnesses are not altogether disinterested, since some of them had opposed the appointment of the accused some years back as the patel of the village. Some female witnesses are under the control of their male relatives. These considerations lead me to think that the expressions actually made use of by the accused have been exaggerated. But this much is certain that there was an altercation on Sunday morning and that the accused made use of filthy and provoking language towards the complainant, because she cast a reflection on the reputation of his relatives by declaring before others that her younger sister Lutchmana was not given more than one sadee. I do not however think that the accused made use of any statement intending thereby to really affect her virtue and respectability."

From the above it will be seen that it was the complainant that first provoked the accused by stating that he had neglected to provide clothing for Lutchmana. After this the accused apparently made use of some abusive language, but according to the magistrate's finding, there was nothing affect-

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ing complainant's moral character or respectability, so as to cause insult or provocation of such a nature as was likely to induce complainant to break the peace. The conviction and sentence cannot therefore be upheld. I agree to the order proposed by my colleague.

Conviction quashed.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

GOVERNMENT *v.* VENKATA ROW.*

1892 *July* 11.

Indian Penal Code (Act XLV of 1860), ss. 211, 511 and 193—Abetment—Preparation—Conspiracy—Evidence—Intention—Motive.

The prisoner was accused of having made a false complaint of theft of jewellery and currency notes as having occurred in his house and of having wrongfully accused one M of the crime, in support of which he also gave evidence and especially produced a list of the stolen property in which were noted certain currency notes proved to have been cancelled and withdrawn from circulation long previous to the date of the alleged theft, as well as articles of jewellery and a bond which S stated had been given to him by the prisoner for the purpose of being placed in one R's house in pursuance of an arrangement made with the police, which was not carried into effect.

Held by the Court (KRISHNA MURTI and RAMACHENDRA IYER JJ.) that the evidence did not prove an offence punishable under s. 211 or s. 193 of the Penal Code. But (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER J.) the accused was rightly convicted on the charge under s. 511/193, Penal Code, of abetment of the offence of fabricating false evidence.

Per KRISHNA MURTI, J.—One of the essential ingredients for a charge under s. 211, Penal Code, is found wanting. The accused cannot be found to have lodged the complaint without just or lawful ground; and the prosecution does not attempt to establish any intention on his part to injure M.

* Criminal Appeal No. 83 of 1892 against the finding and sentence in Criminal Case No. 1 of 1891 of Mr. C. Madiah, District Magistrate of Kolar, dated the 1st day of June 1891.

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With regard to the charge under s. 193, Penal Code, the facts only constitute an abetment, not an attempt. The accused did not himself attempt to throw the jewels into R's house. He instigated others to do so and aided them, if the acts alleged against him are true, by lending them the jewels: but they did not make any preparation to commit the offence; much less did they attempt it.

If, however, any offence was intended, the design was inchoate and did not mature itself into any preparation; much less could it therefore be regarded as an attempt to commit an offence by the police or an abetment of that attempt by the prisoner.

Per THUMBOO CHETTY, C. J.—In all criminal cases we have to see whether what was done by the accused was done intentionally. Motive is not very essential though intention and motive may often concur and proof of motive may demonstrate the intention; but absence of motive will not excuse an illegal intention. If an illegal act is done intentionally without just cause or excuse, we must presume that there was sufficient intention to injure, whether the motive that prompted such intention be good or bad. When the facts of the case are such as show that the accused in making the complaint acted with a reckless disregard for the rights or liberties of others and was grossly negligent in ascertaining the truth, he cannot be said to have had reasonable and probable cause or good and just ground for making the complaint or accusation. * * * The complaint made by appellant in so far as it implicated M was without just or reasonable cause. The criminal proceedings taken by the police against M upon information given by appellant were unjustifiable under the circumstances. So far as M was concerned she was unjustly suspected and accused. The information given against her was intended to be acted upon by the police inspector and was actually acted upon to her prejudice and injury and therefore the appellant has committed an offence punishable under s. 211, Penal Code.

So far as the appellant was concerned it seems that he had completed his preparations for fabricating false evidence and actually sent the jewellery and bond to the police in order to induce the latter to place them in the house of somebody so that they may eventually be used as evidence against the person in whose house they may be found. He did what was necessary to facilitate the commission of the offence by the police and if he failed in his attempt it was by reason of the police having refused to carry out his intention. His acts clearly amount to an attempt to fabricate false evidence through the instrumentality of the police.

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As to the fact of a theft, it is unnecessary to consider what was the motive in preferring the false complaint. Whether it was to defraud his daughter-in-law or to bring R into trouble the fact remains that the complaint, if not wholly untrue, was quite false with regard to the cancelled notes: and the appellant was therefore guilty on the third charge.

Per RAMACHENDRA IYER, J.—I am of opinion that there is no adequate evidence to support a conviction under s. 211 of the Penal Code. I think the Magistrate was not wrong in convicting the accused upon the second charge. Even if the police did not join in the conspiracy, the accused was an abettor (*see* Penal Code, s. 108 Ill. *(a)*). He was not guilty of an attempt to fabricate false evidence but of abetment of the offence of fabricating false evidence. The conviction will be altered accordingly but the sentence need not be altered.

Mr. *Nunjundappa* for the appellant.

Assistant Government Advocate for the Government.

The facts of the case are fully given in the Chief Judge's judgment and need not be here repeated.

The judgments of the Full Bench of the Chief Court (THUMBOO CHETTY, C. J., RAMACHENDRA IYER and KRISHNA MURTI, JJ.) were as follows:—

KRISHNA MURTI, J.—A careful consideration of the evidence in this case shows that none of the convictions can be sustained.

The appellant has been convicted of three offences and the charges, in the words of the Magistrate, are as follows:—

Firstly, that you, on or about the 13th of February 1889, with intent to cause injury to Munivenkati, appeared before the Head of Police and there falsely charged the said Munivenkati with having abetted the commission of a theft in his house, and that there was no just or lawful ground for such a charge and thereby committed an offence punishable under s. 211 of the Indian Penal Code.

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Secondly, that you, on or about the 6th day of November 1889, attempted to fabricate false evidence, by entrusting three jewels and a document marked Q1, Q2, Q3 and Q4, respectively, to one Shamana, to be introduced into the house of one Ramalal, intending that such property should appear in evidence before a public servant, so that this circumstance may cause Ramalal to be convicted of theft, and thereby committed an offence punishable under ss. 511 and 193 of the Indian Penal Code.

Thirdly, that you on or about the 15th day of February 1890, at Kolar, intentionally gave false evidence on complaint in Miscellaneous Case No. 6 of 1890 being a judicial proceeding then pending before the Munsiff Magistrate of Kolar and being bound by solemn affirmation to state the truth, intentionally gave false evidence, by knowingly and falsely stating that a theft of certain jewels and currency notes had been committed in your house, whereas you were aware that such had not taken place, and thereby committed an offence punishable under s. 193 of the Indian Penal Code.

A good deal of evidence, both oral and documentary, has been recorded without much regard to the strict rules of the law of evidence, and the result is, that there is a great show of evidence but in reality, evidence is wanting in most material particulars. To mention one of the most glaring defects, the statement which the prisoner is said to have made before the Munsiff Magistrate is not filed with the record, and there is no legal evidence whatever forthcoming that the prisoner did ever make such a statement. He denies the offence and, for the prose-

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cution, there is not a particle of evidence. A second irregularity which may be noticed is the admission as evidence of the Amildar's special diary marked as exhibit B. There is no evidence whatever to show that the prisoner himself volunteered a complaint before the Amildar, who, I believe, is called the Head of Police. The information of theft was conveyed to him through, it may be supposed, the Inspector, and he investigated the case. The prisoner is then said to have made a statement. The law does not allow such a statement to be signed by the witness and the written record, if there is one, is not receivable in evidence (*see* s. 161 of the Code Criminal Procedure). There is no other police officer examined on this point and there is therefore an entire absence of legal evidence to show that the prisoner ever made such a statement. The Inspector of Police has been examined as the first witness for the prosecution and his statement is a tissue of a great deal of hearsay and irrelevant matter and very little of legally admissible evidence. The same remark applies to the testimony of police constable Sooranarnapa, who went to Erode, and is said to have had an interview with the daughter-in-law of the accused. There are several other irregularities equally grave, and the result has been a great difficulty in arriving at a correct conclusion from purely legal data. The process of eliminating inadmissible evidence, the impressions created from which must have improperly influenced the District Magistrate, has been very difficult indeed. Letters which have not been admitted by the prisoner and which have not been otherwise proved have been used as evi-

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dence. Eschewing however all that has been admitted improperly, the available evidence will be summarised and considered so far as it has any bearing on each of the three offences of which the prisoner has been convicted.

Eleven witnesses have been examined for the prosecution. The 2nd, 3rd, 4th, 5th, 7th, 9th and 10th say nothing about the theft. They had no conversation with the accused or any one connected with him. The 2nd witness is a goldsmith who identifies one of the jewels referred to in the second charge. 3rd, 4th, 5th and 7th also confine themselves to these jewels. The 9th, Syed Kassim, Police Duffadar, found the boxes Y and Y2 at Bowringpet and the 10th, Rama Rao, produced a letter from the Currency Department. These witnesses do not throw any light on that part of the case which refers to the theft, and the bearing of the second charge on the first will be considered hereafter. Neither police inspector Shama Rao, nor his detective Sooranarnapa, has anything to say on this matter, while Thimana, who seems to have been accepted as the prisoner's confidant, did not hear from him that the theft was a myth. When asked how he could produce a document said to have been lost, all the prisoner said was, that he had incorrectly included it, but did not avow that the story about the theft was false. He persistently adheres to his statement that the theft complained of did really take place. He has examined several witnesses for the defence, notably Venkatachar (21st witness) who, to all appearance, is a respectable witness, and they state that the theft was detected by the wife of the pri-

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soner and that it really did take place. There is nothing whatever on record to suggest the suspicion that the prisoner had anything to do with the discovery of boxes at Bowringpet. There is no evidence whatever to show the difficulties of carrying the stolen property at once to Bowringpet, which are alluded to by the District Magistrate. Granting that the facts relied upon by him are of local notoriety, it is by no means clear that a thief committing such a large theft so cleverly and clandestinely would not try to run away as far as possible before the theft was detected. The dimensions of the boxes have not been elicited and what was more easy than to put them in a transit and speedily run away with them unheeded to the nearest railway station. The conception of the idea is as natural as the execution is easy. No improbability attaches to the circumstance and the discovery of the boxes, with which the prisoner is in no way connected, is favourable to him. There is no justification whatever for raising presumptions unfavourable to the accused from this circumstance.

The District Magistrate relies upon two facts in support of his conclusion; they are firstly, that a few of the currency notes entered by the accused in the list as stolen were found to have been cancelled, long before the date of theft, and secondly, that he produced the jewels and the document referred to in the second charge, though he had included them in the list as stolen property. On neither of these premises can any conclusion adverse to the prisoner be logically based. In the first place, there is no legal evidence to prove the cancelment of the

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notes, except the letters said to have been received from the Currency Office. Waiving however this technical objection, the District Magistrate seems to have overlooked the fact that the accused was labouring under a great disadvantage in regard to drawing up a list of the notes. His list in the boxes had been lost. He had to tax his memory and have recourse to other sources of information for making out a list. He took considerable time and it was on the second or third day that he furnished the list. It may be that in some particulars he is wrong or rather he has made mistakes, but can this fact *per se* support a conclusion that the theft is altogether false? At the most, it may create a doubt or a suspicion, but it will be seen that till it can be positively found that the theft did not occur, the prisoner cannot be convicted on mere surmises and suspicions. The prisoner has satisfactorily explained why he did not correct the list when he sent a copy of it to the inspector in October. He was asked to send a copy and he sent it. As the inspector himself went to Madras to ascertain all about these notes, the prisoner cannot be taken to task for not giving information of the cancelment to him. This circumstance must therefore be dismissed from our consideration as it does not prove the question at issue conclusively.

With regard to other incidents disclosing a conspiracy to ruin Ramalal, it is only necessary at this stage to refer to the document *Ex. Q4* as it will be convenient to discuss it in detail by and by. Assuming, for the sake of argument, that it was the prisoner who delivered the jewels, there is an

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utter absence of evidence to identify them individually with any of the articles included in the list of stolen property. There were a *Lavangdhan*, a *Nagara* and a *Hanumantha tali* in the list. But what evidence is there to show that they were identical with *Exs. Q1, Q2* and *Q3*? Could not the prisoner have possessed others or borrowed them from another person? Simply because he produced them, can the conclusion be jumped to, that the story about the theft is false? The whole incident is not inconsistent with the theory of a theft. It may again, if true, have been a measure conceived not to ruin Ramalal, but to trace out a true occurrence by unjustifiable means. The evidence regarding *Ex. Q4* renders the conclusion, that it is the genuine document said to have been lost, impossible. The only coincidence between the lost document and *Ex. Q4* is, that it contains an endorsement of the repayment of fifteen rupees. The stamp paper bears date long anterior to the real date of *Exh. Q4* and is for half a rupee. The stamp vendor's evidence, which is reliable, supports that of Gopal Krishnia, and both of them say that, on the date of the execution of the document, a stamp paper of the value of one rupee was bought and sold. Gopal Krishnia denies the document, and the prisoner does not admit it. He may have admitted it before the Munsiff on imperfect observation, but such admission cannot be conclusively used against him. Taking the whole evidence together, it seems that the preponderance is in favor of holding *Ex. Q4* to be a fabrication. It is not to our purpose to trace how this document came into exist-

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ence, but the conclusion seems unsound that it is the stolen bond.

This summary of the evidence clearly shows that it is impossible to say that the theft did not take place. The prisoner may not have furnished conclusive proof that a theft did take place, but there is no evidence whatever to support a negative finding or to express affirmatively, that the information the prisoner gave of the theft is false.

One of the essential ingredients for a charge under s. 211 of the Indian Penal Code is thus found to be wanting. The above exposition of the case is sufficient to show that the prisoner cannot be found to have lodged this information without just or lawful ground. Coming now to his intent to injure Munivenkati, the prosecution itself does not attempt to establish such an intention on the part of the prisoner. There is no evidence at all to support the lower court in what it has said regarding the prisoner's motives in connection with his daughter-in-law or Ramalal. Ramalal himself has come forward to declare his friendship for the accused and no reasons have been shown why he should not be believed. Where the District Magistrate derived his knowledge of their past dealings it is impossible to say, as there is nothing on the record. The prisoner has likewise proved that his daughter-in-law is well disposed towards him, and the record does not contain any evidence of the dispute about maintenance. Properly speaking, the prisoner need not have proved as much as he did, and it is disappointing to find that a magistrate of Mr. Madiah's experience should draw an inference

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unfavourable to the prisoner from his very proper and natural disinclination and omission to drag his daughter-in-law to court. Referring to Munivenkati herself, what proof is there to show that the prisoner intended to injure her. She was the only servant in the house having access to the room and very naturally he suspected that she might have helped others in the commission of the theft. The inspector himself significantly states as follows:— "I did not search the former's house as the accused did not want me to do so." The statement apparently has reference to Munivenkati and unmistakeably indicates that what the prisoner remarked about her was an expression of his honest suspicion and was not inspired by any bad motives. He did not want her house to be searched. Other inmates of the house were also suspected and subjected to police investigation, and there is no explanation why Munivenkati alone should be singled out as being the object of the prisoner's hatred. Munivenkati was examined as a witness for the prosecution and she had nothing to say against the accused. This is all the evidence which has been relied upon to convict the appellant of an offence under s. 211, and it will be seen from the analysis, here presented at considerable length and in great detail, that the conviction cannot be sustained.

The third charge is cognate to the first and for the same reasons the conviction under that charge also must be set aside. There is literally no evidence on record that the prisoner gave any evidence before the Munsiff in a judicial proceeding and, this defect apart, the facts relied upon by the lower court

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have been shown to be inconclusive and insufficient to support the charge. The charge does not refer exclusively to the inclusion of the cancelled notes, and it has been shown above that the occurrence of the theft has not been found to be positively false. This conviction must also be reversed.

Lastly, with regard to the charge under s. 193 of the Indian Penal Code, accepting the facts as they have been found by the magistrate, they only constitute an abetment and not an attempt. The prisoner himself did not intend to throw the jewels into Ramalal's house. He instigated others to do so and aided them, if the acts alleged against him are true, by lending them jewels. In the sequel those who were instigated did not enter into the conspiracy nor carry out the wishes of the prisoner. They did not even make any preparation to commit the offence. Much less did they attempt it. The conviction for an attempt is clearly wrong, and what must be considered in connection with this part of the case is, whether the evidence on record conclusively establishes an abetment.

It must be premised as impossible of belief that, without encouragement from the police officers, the prisoner would, of his own accord, have dared such a venturesome project. There is no evidence to show that either Shamana or Sooranarnapa was his confidant. The latter was a police constable deputed as a special detective and was acting with all the zeal and ambition of an unscrupulous irresponsible police-officer whose sole aim and end was to earn the credit of detecting the crime. The former was acting under the high pressure of an offer of a

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large reward by the amildar. Between these two there is no knowing how this idea was conceived and worked out. They were left to themselves. It may be that the inspector was taken into their confidence, but he did not discourage them. The idea was broached to him in the month of October and the communication did not rouse any suspicion regarding the truth of the occurrence in his mind. If such had been the the case, his trip to Madras remains unaccounted for. In this trip also, he was accompanied by both these men and they were sent to other places. There is no explanation why the detectives should have been sent elsewhere. It was not till November that the police took any decisive action regarding the jewels. But all the circumstances clearly indicate that it was not in November that the jewels were delivered. The evidence which has been adduced to show that the prisoner himself carried the jewels to the place where Shamana was writing the accounts in company with several others is trash and utterly unreliable. Two of these were patels. A man of the prisoner's intelligence and experience, who was for a long series of years an amildar, cannot be denied the ordinary caution and shrewdness of an ordinary man, who would not have paraded the jewels so publicly or acted so openly as the prisoner is said to have done. The evidence is moreover discrepant. The witnesses simply saw the jewels with Shamana after the prisoner's return. But Sooranarnapa makes it out that Shamana disclosed the whole story to them, that these witnesses pointed out the impropriety of the evil design and that they advised him to communicate the whole

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affair to the inspector. This officer of police cannot be left behind his subordinates, and he says that it was at his suggestion that the prisoner carried the jewels to the detectives. The sequel is even more farcical. They are not taken to the inspector's house. They are taken to a public court, and there the inspector receives and sends them officially to the lockup duffedar. The whole scene appears as if enacted for a special purpose and the suspicion irresistibly steals on one's mind that the whole conspiracy, if true, was conceived with some special design and, when that was found impossible, was diverted in another direction. If it were not for the value of the jewels, which is said to be Rs. 200, and the improbability of the police having procured them at their own cost, the whole affair might have been rejected as being utterly false. Even granting that the inspector was disappointed in getting a loan from the prisoner and was intent upon doing him injury, it is too much for him to have laid out Rs. 200 from his pocket. He seems to have been a man not very scrupulous as, even in this case, he did not hesitate to receive small sums from the prisoner. It is this circumstance of the value of the property that lends any weight to the suggestion that the prisoner gave the jewels to the police with a sinister motive. For the reasons already given, it is impossible to believe that the police connection with these jewels began only in November. The circumstances throw out a very strong suggestion that it was in the early part of October that the police began to work in this direction. Nor is the evidence reliable to prove that the object was to put these jewels into Ramalal's

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house. The idea might perhaps have lurked in the minds of the police, but the testimony of Ramalal himself, which has not been rebutted and which there is no reason to discredit, conclusively shows that the prisoner had no motive against him. The most to be said against the prisoner is, that it is possible and perhaps probable he gave the jewels to the police when asked for by them with some indefinite and vague object which they might have had in view towards the detection of the crime. The evidence is by no means reliable to show that the prisoner did of his own accord attempt or abet the fabrication of this evidence against Ramalal. The circumstances throw a great deal of suspicion on his conduct and show that he was a willing agent in the hands of the police to co-operate with them in sinister ways, and the only palliation in his favor is, that if his case is true, he had lost nearly all his wealth and was in great confusion of mind. His conduct may be reprehensible and liable to very severe censure, but he cannot be convicted of the specific offence of which he has been charged. The ways of the police are not unknown, and a real thief has been often found out by unjustifiable means, such as the false confession of an alleged accomplice, or the discovery of property never stolen. Though unjustifiable and liable to be strongly condemned, yet the stratagems resorted to by the police cannot be ignored, especially when the guilt of a man like the prisoner has to be determined. It is impossible to resist the suspicion that these jewels were obtained, at a time when the police fully believed the truth of the theft, to be used for some such pur-

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poses of detection as above described. If any offence was intended, the design was inchoate and did not mature itself into any preparation; much less therefore could it be regarded as an attempt to commit an offence by the police or as an abetment of such attempt by the prisoner.

The result of the foregoing considerations is, that the prisoner is, on the several findings of the lower court, acquitted of all the charges, and the fines, if recovered, will be refunded.

KRISHNA MURTI, J.—The above judgment was written before the order of the 21st December* was pronounced. I have again given the matter my best and most earnest consideration and adhere to my opinion that sufficient facts are not proved to sustain the convictions under the three heads of the charge framed by the District Magistrate. I also think that the prisoner's complicity with regard to the jewels and the bond does not render him liable for any offence, which was neither wholly committed nor attempted. The evidence is inconclusive to enable us to hold that the accused instigated or otherwise abetted the commission of any offence.

THUMBOO CHETTY, C. J.—The circumstances which gave rise to the appellant Venkata Row being prosecuted are briefly these:—On the night of the 12th February 1889, the appellant reported to the police inspector, Shama Rao, that a theft had been committed in his house and that property consisting of currency notes, jewels, &c. of the value of about Rs. 15,000 secured in two wooden boxes, were

* Remanding the case to the District Magistrate for further evidence.

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stolen. One Munivenkati a sweeper employed in the house, whom the appellant suspected was then and there handed over to the inspector. She was kept in police custody for two days and as no stolen property was found in her house after search, she was released. On the day following the alleged occurrence the appellant gave a list of the property said to have been lost, i. e., currency notes to the value of Rs. 10,000 and jewels of the value of Rs. 4,832-8-0. The list (*Ex. A*) included the following jewels:— a Lavangdhan, a Ryakade and a Hanumantha Tali, similar to those produced in this case and marked *Exs. Q1*, *Q2* and *Q3* and a bond for Rs. 100 said to have been executed by one Gopal Krishnia, similar in purport and contents to the one produced and marked *Ex. Q4*. On the 14th February 1889, the appellant gave the numbers of five currency notes of the value of Rs. 500 each, and, on the 5th March 1889, he furnished information as to the numbers of the other notes. He also gave information of the loss to the Currency Department at Madras, and received replies which showed that some of the notes were cancelled in the year 1888, several months prior to the date of the alleged theft. Seven of such cancelled notes were actually produced with letter from the Currency Department, marked *Ex. Z.* The endeavours made by the police to detect the theft proved unsuccessful and, on the 6th November 1889, Shamana (a prosecution witness) produced before the police inspector the jewels and bond marked *Exs. Q1* to *Q4*, stating that he got them from the appellant for the purpose of being placed in the house of one Ramalal, in pursuance of a previous arrange-

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ment entered into by the appellant with the police inspector. After ascertaining that seven of the currency notes included in the appellant's list were not actually stolen as alleged and that *Exs. Q1* to *Q4*, which were also included in the list, were actually delivered by the appellant to Shamana, the police reported the case of theft on a *B* form to the Munsiff Magistrate of Kolar, who, for reasons recorded in his order dated 12th March 1890, dismissed the complaint as false. The District Magistrate, Mr. Abdul Rhyman, thereupon directed the prosecution of the appellant for preferring a false complaint. The case was taken up by the First-class Magistrate of Kolar, but, before the enquiry was commenced, an application was made to this court by the appellant, objecting to the legality of the sanction accorded by the District Magistrate. By an order, dated 14th November 1890, this court declined to interfere with the order passed by Mr. Abdul Rhyman, and, as that officer was transferred to another District, the present District Magistrate, Mr. Madiah, was directed to try the case and dispose of it according to law. After a protracted enquiry, the said District Magistrate found that the appellant was guilty, *firstly*, of having preferred a false charge of theft with intent to injure Munivenkati, punishable under s. 211 of the Indian Penal Code; *secondly*, of having attempted to fabricate false evidence against Ramalal, by giving the jewels and bond marked *Exs. Q1* to *Q4* to Shamana for the purpose of being placed in Ramalal's house, an offence punishable under ss. 193 and 511 of the Indian Penal Code; and *thirdly*, of having given false evidence before the Munsiff Magistrate of Kolar

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when examined in connection with his complaint of theft, by stating that certain jewels and currency notes were stolen, knowing or having reason to believe that they were not stolen, an offence punishable under s. 193 of the Indian Penal Code. The appellant was directed to pay various sums as fines and to undergo, in default of payment, various terms of rigorous imprisonment. The fines have been paid, and the present appeal has been preferred on the several grounds set forth in the appeal petition.

By an oversight on the part of the District Magistrate, the statement given by the appellant before the Munsiff Magistrate was not filed as an exhibit. The omission was supplied by the additional evidence taken by the District Magistrate in pursuance of the order of this court dated the 21st December 1891. The appellant does not deny that statement, but alleges, in a long petition put in by him, that that part of the statement in which he admitted the bond *Ex. Q4* as his own was incorrect, that he was examined late in the evening, that it was a fasting day and that he had not his spectacles on when the bond was shewn or read to him that evening. This plea of the appellant will be considered further on.

In all criminal cases, we have to see whether what was done by the accused was done intentionally. Motive is not very essential, though intention and motive may often concur and proof of motive may demonstrate the intention. But absence of motive will not excuse an illegal intention. If a wrongful act is done intentionally without just cause or excuse, we must presume that there was sufficient intent to injure, whether the motive that prompted such in-

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tent be good or bad. When the facts of the case are such as show that the accuser in making the complaint acted with a reckless disregard for the rights or liberty of others and was grossly negligent in ascertaining the truth, he cannot be said to have had reasonable and probable cause or good and just ground for making the complaint or accusation. Now let us see whether the appellant's complaint of theft was true and whether he had good and just grounds for handing over Munivenkati to the police forthwith.

Appellant, in his examination before the Munsiff Magistrate on the 15th February 1890, stated that he last saw the two wooden boxes that were stolen, in his room at 5-30 P. M. on the 12th February 1889. The said room had two doors, one which opened into his office room and the other into his hall. The appellant locked the door of the room in which those boxes were kept, *i. e.*, the door which opened into the hall. The other door the appellant stated was always shut and chained from inside. Taking the key of the room, the appellant went to his garden and returned home by 6-30 P. M. When he left the house the female members of his family and one Runga Rao were in the house and, as he was leaving the house, he saw Munivenkati going in. On his return from the garden, appellant did not find Runga Rao or Munivenkati in the house and at 9 P. M. when he opened the door, the two boxes were missing and the other door leading to the office room had not been fastened as usual. The appellant was absent from his house only for about an hour. During his absence there were all the female members

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of his house there with one Runga Rao. In what part of the house they were, whether close or adjacent to the office room or hall or in any other part of the house, there is no evidence to prove. It is not proved how long Munivenkati remained in the house when she came to sweep and light the house that evening. If she went into the room where the boxes were, she must have gone by the door leading to the office room, assuming that it was not fastened from inside. If it was fastened and the other door was locked by appellant himself it was impossible for Munivenkati to get into the room without breaking open one of the doors or removing the lock of the door. All this could not have been done within the short space of one or three-quarters of an hour without being observed or seen by any of the inmates of the house. The sizes of the two wooden boxes, as stated by appellant in *Ex. A*, are, the one 2 feet long, $1\frac{3}{4}$ feet broad and 1 foot high, and the other about an inch less in length, breadth and height. These two boxes, which are pretty large, could not have been easily removed and carried by a single person without being observed by anybody. Munivenkati was in her own house which was just opposite the appellant's house. She and her husband, at a moment's call, came to the appellant's house, when the alarm was raised that the boxes were stolen. If she or her husband was absent that night, there would have been room for suspicion. Without the slightest ground for suspicion, the appellant causes her to be arrested and taken away by the police inspector. The appellant might have at least withheld his suspicions till a search of her house was

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made. As a matter of fact, no stolen property was found in her house during the search made next morning. My colleague has, I think, misunderstood the inspector's evidence in regard to the search of Munivenkati's house. The appellant did not want one Raghavendrachar's house to be searched. The inspector's evidence, which is quoted below, shows clearly that it refers to Raghavendrachar's house and not Munivenkati's house. "I examined Munivenkati. I did not search her house then (meaning, that very night). I put a guard over her house." On the first occasion, he said he suspected that Munivenkati had assisted others to commit theft. "I did not ask accused on the night of occurrence, whether he suspected the two individuals. I did not suspect them. I was busy. The accused suspected Raghavendrachar and others. I did not search the former's house, as accused did not want me to do so, nor was Runga Row's house searched." It is quite evident that the "former's house" referred to Raghavendrachar's and not to Munivenkati's house. The appellant acted hastily and without just ground in suspecting Munivenkati and causing the police inspector to at once arrest and put her in confinement. It was upon the appellant's information given to the police inspector that the unfortunate woman was taken into custody. Assuming, for the sake of argument, that the two wooden boxes were actually stolen that night, there were no good grounds for suspecting Munivenkati or causing her to be arrested and further subjecting her to the disgrace and annoyance of having her house searched. The arrest took place at about 9 or 10 P. M., and the same night, at about 1 o'clock,

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the appellant went to the police station to satisfy himself that Munivenkati was kept in custody. Next day the appellant gave detailed information of the alleged loss of the jewels and currency notes as per statement *A*. I regard the information contained in this statement as given under s. 154 of the Code of Criminal Procedure and not as an examination under s. 161 of the Code. Be this as it may, it seems to me that the circumstances referred to by the appellant in his examination before the Munsiff Magistrate are not such as amount to reasonable ground for suspecting Munivenkati, much less for causing her arrest and confinement, assuming that a theft had actually taken place. The complaint made by the appellant, in so far as it implicated Munivenkati was without just or reasonable cause. The criminal proceedings taken by the police against Munivenkati upon information given by the appellant were unjustifiable under the circumstances already adverted to. So far as Munivenkati was concerned, she was unjustly suspected and accused. The information given against her was intended to be acted upon by the police inspector and was actually acted upon to her prejudice and injury, and I hold, therefore, that the appellant has committed the offence specified in the first part of s. 211 of the Indian Penal Code, and his conviction by the District Magistrate must be sustained.

Now, as to the question whether a theft actually did take place or not, it seems to me that the appellant's statement cannot be thoroughly relied upon. In the first place, it seems strange that, if there was a burglary within the very short time of less than an hour during which appellant was absent,

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it should have taken place so easily without any noise or disturbance of any kind and unobserved by any of the several inmates of the house. Then again, if the two wooden boxes were locked, the thief would have broken them open and removed the contents. But the boxes were found intact, *i. e.*, in the same state in which they were while in appellant's room, when they were found lying in a well in a chuttram in Bowringpet, the day after the alleged theft was committed. The bulk of the property lost was in the shape of currency notes of the considerable value of Rs. 10,000. It seems strange that, when there was an iron safe in the appellant's house, in which these notes and valuables were usually secured, the appellant should have removed the notes from the safe and kept them in a wooden box, which could be easily tampered with or removed. He says that he was negotiating for the purchase of a village and the grant of a loan and therefore kept the notes in the wooden box. This can not be believed. It would not have taken more than a few minutes to open the iron safe and take the notes out whenever they might be wanted. The story, that for only a month prior to the date of the alleged burglary the appellant had kept the notes, &c., in his wooden box in an insecure place, instead of in the iron safe, seems incredible. As to the currency notes said to have been lost, the appellant admittedly furnished false information. At least six of the notes included in his list were cancelled long prior to the date of the alleged theft. This is clearly shown by the District Magistrate in paras. 17 to 20 of his judgment. Although the appellant was informed of the cancellation of these notes by the

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Currency Department, he studiously refrained from giving the information to the police inspector, who was left to get the information himself by going to Madras and corresponding with the Currency Department. There cannot be the slightest doubt as to the cancellation of the notes. They were produced before the District Magistrate with *Ex. Z*, and as appellant himself was apprized of the cancelment and the cancelled notes themselves have been produced, I fail to see what further proof is needed to show that the notes in question were not current on the date of the alleged theft but were cancelled and retained in the Currency Office several months before the 12th of October 1889. I do not think any exception can be taken to the District Magistrate referring to the entry in *Ex. Z* and to the cancelled notes themselves and finding that the appellant's complaint, in so far as it related to the theft of these cancelled notes, was false. The District Magistrate need not have marked the police diary *B* as an exhibit in this case, though he was at liberty, under s. 172 of the Code of Criminal Procedure, to use the diary to aid him in determining the value of the evidence given before him by the police inspector. Even excluding from consideration the entry in *Ex. B* with regard to one of the seven cancelled notes, the complaint is shown to be clearly false with regard to the remaining six notes.

I will now refer to *Exs. Q1* to *Q4*, which it is said were given by the appellant to prosecution 11th witness, Shamana. The appellant stated as follows before the District Magistrate—

"Property marked *Q1* to *Q3* do not belong to me,

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nor was it handed over by me to Shamana. I see *Ex. Q4.* It does not belong to me. I admitted it as mine before the Munsiff Magistrate, but on close examination I find it is not mine nor did I give it to Shamana."

I have given this part of the case my best consideration and I am disposed to accept the finding of the District Magistrate, that the jewels and bond marked *Exs. Q1* to *Q4* were given by the accused to prosecution witness Shamana, for reasons given in paras. 29 and 30 of the lower court's judgment, in which I concur. The appellant called witnesses to prove that on the 6th November 1889, when the said jewels and bond are alleged to have been given by him, he was at Bangalore. The evidence of the witnesses is by no means conclusive and trustworthy, as shown by the District Magistrate in para. 43(*a*) of his judgment. The 17th, 23rd and 25th witnesses for the defence were called to prove that *Exs. Q1* to *Q3* were not the jewels that were in the appellant's house. The District Magistrate distrusted their evidence; but even assuming that their evidence was true, that does not disprove the fact deposed to by Shamana and other witnesses for the prosecution, that *Exs. Q1* to *Q3* were actually given by the accused. Even though the said jewels were not the very jewels mentioned in the list appended to *Ex. A,* yet the appellant might have procured them somehow as they answered to the description given in his list and have delivered them to Shamana with a sinister motive. Whatever may be the doubt with regard to the jewels *Exs. Q1* to *Q3*, there can be no doubt whatever as to *Ex. Q4* having been with appellant. Before the

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Munsiff Magistrate, he swore positively that the bond *Ex. Q4* was his, and that he kept it in one of the wooden boxes. Now he tries to get behind that clear admission, by stating that it was a fasting day when he was examined before the Munsiff, that it was late in the evening and that he was unable to closely examine the document, because he had not his spectacles on. I consider this excuse flimsy and uncreditworthy. It is absurd to suppose that the prosecution witnesses or the police inspector could have fabricated *Ex. Q4* with all the details as to part payments, &c. The bond was not registered and therefore no copy could have been obtained. No other person than the appellant could have known the date of the bond, the amount for which it was executed, the part payments made, &c. The appellant alone must have furnished all the required information, even if we assume that *Ex. Q4* is not the original bond but a fabrication. From where did he get all this information? His memory could not have helped him in at once furnishing such minute details. He had no accounts showing the transactions connected with the loan and repayments. It seems to me that *Ex. Q4* is either the original bond or a copy made from the original with the signatures of the executants forged. In either case the appellant, who delivered *Ex. Q4* to Shamana apparently intended that it should be used in connection with his complaint of theft in such a manner as to implicate somebody. Whether the appellant's object was to bring Ramalal or any other person into trouble, is immaterial. There was clearly an attempt to fabricate false evidence for the purpose of being used in any judicial proceeding

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that might be held in connection with the appellant's complaint of theft, within the meaning of s. 193 of the Indian Penal Code, and such an attempt is punishable as an offence falling under ss. 193 and 511 of the Indian Penal Code. My learned colleague seems to think that, assuming the appellant gave the jewels and bond to the police through Shamana for purposes of detecting the alleged theft, "the design was inchoate and did not mature itself into any preparation and much less could it therefore be regarded as an attempt to commit an offence by the police or an abetment of that attempt by the appellant." So far as the appellant was concerned, it seems to me that he had completed his preparations for fabricating false evidence and, by sending the jewels and bond *Exs. Q1* to *Q4* to the police in order to induce the latter to place them in the house of somebody, so that they might eventually be used as evidence against the person in whose house they might be found, did what was necessary to facilitate the commission of the offence by the police; if he failed in his attempt, it was by reason of the police having refused to carry out his intention. Whether the police inspector was at first in collusion with the appellant or not, and whether the appellant's intention was to injure Ramalal or anybody else, the appellant's acts clearly amounted to an attempt to fabricate false evidence through the instrumentality of the poliee.

As to the third or general count of the appellant having given false evidence with regard to the theft, I am of opinion that, even if a theft did actually take place, the appellant grossly exaggerated the value of

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the properties said to have been lost and deliberately spoke untruth with regard to the cancelled currency notes. It has been clearly proved that six of the notes admitted by the appellant to have been included in his list of stolen properties, were cancelled and their circulation stopped long prior to the date of the alleged theft. The allegation that these notes were in the wooden boxes said to have been stolen on the 12th February 1889, is palpably false. Even before the Munsiff Magistrate he gave the value of the property lost at about Rs. 15,000, which included the value of the cancelled notes. The inclusion of cancelled notes in the list of stolen property, and the attempt subsequently made to induce the police to introduce the jewels and bond *Exs. Q1* to *Q4* into somebody's house and to detect the alleged theft, impress me with the correctness of the District Magistrate's finding, that the allegation as to the occurrence of theft is wholly false. It is unnecessary to consider what was the motive in preferring the false complaint. Whether it was to defraud his daughter-in-law or to bring Ramalal into trouble, the fact remains that the complaint, if not wholly untrue, was quite false with regard to the cancelled notes.

I regret I have the misfortune to differ from my learned colleague in this case. I have given the case my most anxious consideration, and I have arrived at the conclusion that there are no good grounds to interfere with the convictions or sentences complained of. I would reject the appeal.

RAMACHENDRA IYER, J.—The appeal was heard by my colleagues, and as they were divided in opinion,

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it was laid before me under s. 429 of the Code of Criminal Procedure. I considered it desirable to hear the advocates, and the appeal was argued before me, by Mr. *Nunjundappa* and the *Assistant Government Advocate.*

The District Magistrate has discussed the case in all its aspects; the opinions which have been recorded by my colleagues contain everything which can possibly be said in support of or against the conviction; and I find that I can suggest nothing new on any of the points which arise for consideration. That being so, I think it is not necessary that I should set out the facts or reiterate the comments thereon which have been so fully and forcibly made by one or the other of the learned judges.

I am not prepared to hold that there was no theft at all, and that the complaint of theft made by the accused was wholly false.

The accused having lost boxes, which contained his property and a list of the property, said that he had no means of giving full and correct particulars thereof. He had to recollect from which offices he could have received the currency notes which had been stolen from him, and he had to gather information from those offices. The list which he subsequently furnished to the police must necessarily be incorrect, and it is not surprising that it should have contained the numbers of some currency notes which had been cancelled some time before the date of the theft. He very probably exaggerated the value of the property. As an honest man, he ought to have informed the investigating officer of the contents of the letters which he received

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from time to time from the Currency Department in Madras. But I think that the incorrectness of the list and the omission to inform the police that some of the notes alleged to have been stolen had been cancelled were not sufficient to prove that there had been no theft. The absence of evidence to connect the accused with the throwing of the boxes into a chuttram at Bowringpet, the trouble which he took to collect information of the numbers of the stolen notes and the desire he evinced to consult an astrologer in the hope of discovering a clue, tend rather to create an impression that he believed his property had been stolen. I am of opinion there is no adequate evidence to support a conviction under s. 211 of the Penal Code. I would quash the conviction, and also the conviction for giving false evidence.

I think the Magistrate was not wrong in convicting the accused upon the second charge.

I do not agree in the suggestion made by the accused that the jewels *Exs. Q1* to *Q3* did not belong to him and that the bond *Ex. Q4* was not genuine. I am not prepared to believe that the police fabricated the bond and made jewels worth Rs. 200 for the purpose of bringing a false charge against him. If the jewels and the bond belonged to him, it seems very probable that they came into the hands of the police at the time and in the manner deposed to by them. The District Magistrate has disbelieved Ramalal and has believed the prosecution witnesses, and I see no reason for concluding that he was wrong. It may be that the police were not at first unwilling to make themselves accomplices of the accused in carrying

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out a nefarious plan, or that they seemingly agreed to his proposal with the intention of getting him into a trap. Even if the police did not join in the conspiracy, the accused was an abettor. *See* s. 108 of the Indian Penal Code, Illustration (*a*). He was not guilty of an attempt to fabricate false evidence, but of abetment of the offence of fabricating false evidence. The conviction will be altered accordingly, but the sentence need not be altered.

Conviction altered. Sentence confirmed.

MISCELLANEOUS APPLICATION.

Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1892 *April* 12.

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Approver—Contradictory statements—Prosecution for giving false evidence—Code of Criminal Procedure, (Act X of 1882), s. 339.

Held, that, where the evidence of an approver before the committing Magistrate, which he subsequently retracts before the sessions court, cannot be regarded as voluntary and truthful evidence, sanction to prosecute him for giving false evidence should not be granted.

The court is bound to get behind the two contradictory depositions, to take into consideration all the facts of the case and to determine whether, in the interests of justice, it is imperative to order the prosecution of the approver.

An approver, Munivenkata, retracted on the Sessions trial the statements he had made before the committing Magistrate and in respect of which he had been granted a pardon by the District Magistrate; he alleged he had been induced by the police

* Criminal Petition No. 6 of 1892, praying for sanction to prosecute Munivenkata, 1st witness for the prosecution in Bangalore Sessions Case No. 16 of 1891, for false evidence.

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to make the previous statements which were all untrue.

The Assistant Government Advocate (Mr. *S. Ramaswami Iyer*) under instructions from the District Magistrate, applied to the Chief Court for sanction to prosecute the approver on a charge of giving false evidence.

The Orders of the Chief Court (THUMBOO CHETTY, C.J. and RAMACHENDRA IYER, J.) were as follows :—

THUMBOO CHETTY, C. J.—During the preliminary enquiry into a murder case, one Munivenkata, who was one of the accused, was admitted as an approver and examined as a witness for the prosecution before the committing Magistrate. He deposed to certain circumstances connected with the murder, implicating himself and the other accused. During the Sessions trial, he denied all knowledge of the murder and stated that he was induced by police torture and tuition to become an approver and to make the statements which he did before the committing Magistrate. Thereupon Munivenkata was tried along with the other accused, the pardon granted to him having been withdrawn. The case against all the accused fell through for want of evidence. The Assistant Government Advocate now applies to this court, under instructions from the District Magistrate, for sanction to prosecute the said Munivenkata for having made two contradictory statements and wilfully perjured himself.

When the Code of Criminal Procedure was amended in 1882, a new provision was added to s. 339 to the effect, that the sanction of the High Court should be necessary for the prosecution of an approver for

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perjury. The reason assigned by the Select Committee for making this important amendment was thus stated*—"In cases where a pardon is tendered to and accepted by a person, and such person gives evidence before a Magistrate in a preliminary enquiry, we consider that he should not be forced to adhere to that evidence in a subsequent trial, through fear of being prosecuted on an alternative charge of giving false evidence either before the Magistrate or the Judge. It might happen that he was wrongly induced or coerced into giving evidence before the Magistrate. We have accordingly provided in s. 339, that no prosecution for giving false evidence in a statement made under promise of pardon shall be entertained without the sanction of the High Court." It seems to me that this new provision is a wholesome and salutary one in furtherance of the ends of justice, and that the present case is exactly one of the kind contemplated by the wisdom of the members of the Select Committee.

The police enquiry into this murder case commenced on the 21st August 1891. Munivenkata's house was searched and he was arrested the same day in a village called Hooskoor (Anekal Taluq, Bangalore District) where there was no police station. Instead of the accused being taken to the nearest police station, he was kept in a shanbog's house and guarded by the jemadar and four or five constables. Munivenkata and six others were arrested and four of them, including Munivenkata, made confessional statements before the Bangalore Town Magistrate on the 25th August 1891. Even after these confessions were

* Vide *Gazette of India*, February 4, 1882, p. 277, Part V.

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made, the said accused were in the custody of the police. Properly speaking from the moment the accused were produced for the purpose of making these confessions, they ought to have been taken away from the hands of the police and sent to the lock-up in the central jail and kept aloof from all police influence and interference. For several days even subsequent to the 25th August, when Munivenkata is said to have made his confession, he was kept in the custody of the police. On the 28th August, the inspector took Munivenkata alone from Bangalore to Hebgode, a distance of 13 miles, according to the direction of the Police Superintendent and after a detention of two days he was produced before the District Magistrate on the 30th August and was tendered pardon and made an approver. It is very much to be regretted that the District Magistrate did not thoroughly satisfy himself as to what the police did with Munivenkata, when they took him alone to Hebgode and kept him in secret custody for two days before applying for the grant of a pardon. If the District Magistrate had personally questioned Munivenkata without the presence of the police, the unfortunate man would probably have had an opportunity of representing to the District Magistrate the treatment he was subjected to at the hands of the police and under what circumstances he was made to give evidence for the prosecution. But he was produced by the police, and, in their presence the pardon appears to have been granted by the District Magistrate, who directed Munivenkata's release on bail in two sureties for Rs. 300 each. The inspector himself found bail and induced patel Munai

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Gowda and shanbog Dasapiengar to stand security for Munivenkata. On the following day (31st August) the Superintendent of Police and the head-quarters Police Inspector appeared before the committing Magistrate and produced the pardon granted by the District Magistrate. Thereupon Munivenkata's name was removed from the list of accused and he was examined as a witness for the prosecution. That evening, for the first time, the police ceased to have anything to do with Munivenkata who was sent to the central jail. The case was committed to Sessions on the 12th September 1891 and on the very first day the Sessions trial was commenced, *i. e.*, on 27th October 1891, Munivenkata, when examined as prosecution first witness, retracted the statement he made before the committing Magistrate and deposed as follows:—

"The police seized my father and took him away to Hooskoor. I was weeding my field three days afterwards. Shanbog Dasapa and a constable came to my field and said to me that my father wanted to speak to me. I went with them to Hooskoor. They took me to the shanbog. The police jemadar was there. He asked me what I knew about Motah's death. I said I knew nothing about it. The jemadar put the hair of my head (ಜುಟ್ಟು) under his foot. Two constables held one each my arm on either side. The jemadar continued to trample on my back with his foot. It caused me great pain. I continued to say I knew nothing. The pain became unbearable. I agreed to say as I was tutored. Therefore I stated in *Ex. A* what I was tutored by the jemadar to say. I am horribly afraid of the jemadar even now. What I stated in *Ex. A* is false and tutored. I know nothing about Motah's death."

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Whether the alleged torture is true or not, it is admitted by the Inspector that, from the date of his arrest (21st August) and up to the date of his examination before the committing Magistrate (31st August), Munivenkata was in police custody. He was taken alone to Hebgode and brought back and it was soon after this solitary interview with the Police Superintendent he was made an approver, and after remaining with the police for another night, was produced before the committing Magistrate for examination and sent to the central jail. It is impossible to arrive at any other conclusion than that the confession and statement of Munivenkata were all made under police influence, or at any rate while he was under police custody. His evidence as an approver before the committing Magistrate cannot be regarded as voluntary and truthful evidence, and I am therefore reluctant to accord the sanction applied for, for his prosecution for perjury. The District Magistrate would have exercised a wiser discretion if, before granting the pardon, he had thoroughly satisfied himself that the accused Munivenkata was quite free from police influence and if he had sent for and carefully perused the proceedings of the case before instructing the Public Prosecutor to make this application.

I would reject this application.

RAMACHENDRA IYER, J.—I concur. I am of opinion that we are bound to get behind the two contradictory depositions, to take into consideration all the facts of the case, and to determine whether, in the interests of justice, it is imperative to order the prosecution of the approver. The evidence

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given by the approver before the Magistrate does not impress me as having been truly and voluntarily given. There were two men charged with murder and four others charged with having concealed evidence of the offence. It is significant that each of those four men made a confession. It is impossible to shake off a suspicion that some inducement was held out to each of them, and that the confessions were not spontaneous. When I consider this along with the facts stated in the Chief Judge's order, I think that we ought not to prosecute a man for having retracted a false confession.

Application rejected.

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CIVIL AND MILITARY STATION OF BANGALORE.

CIVIL.

REGULAR APPEALS.

Before General Sir H. N. D. Prendergast, K. C. B., Offg. Resident and Colonel P. D. Henderson, C. S I., Resident.

THIPPIA (DEFENDANT No. 1) v. CHICK RUDRAPA (PLAINTIFF).*

AND

CHICK RUDRAPA (PLAINTIFF) v. THIPPIA (DEFENDANT No. 1).*

Res judicata—Reduction in subsequent suit of compensation awarded by previous decree—Grant of relief unasked for by plaintiff and on matter he is not concerned with—Decision in suit binding on parties only or their representatives—Code of Civil Procedure (Act X of 1882), s. 13.

In 1883 *C* obtained a decree against *N* on a hypothecation dated in 1881 and purchased the hypothecated lands at sale in execution of the decree.

In 1889 *T* obtained a decree against *N* for recovery of the lands as being his property and for compensation in respect of some that had been sold.

C then, in 1891, filed a suit against *T* to recover possession of the lands he had purchased in execution of his decree of 1881 and for partition from *T's* lands.

The lower court decreed a portion of the lands sued for to *C* and reduced the compensation awarded to *T* in the previous suit.

Held, on appeal, that the land sued for being included in the hypothecation of 1881, *C's* suit is not *res judicata*. The decision in a suit can be binding on those only who are either parties to it or claim under them by a title arising subsequent to the commencement of that suit. This is the reasonable construction to be placed on s. 13 of the Code of Civil Procedure and is supported by the rulings in *Bonomalee Nag* v. *Koylash Chunder Dey*(1) and *Sita Ram* v. *Amir Begam*(2). The hypothecation to *C* took place in 1881,

* Appeals Nos. 22 and 25 of 1891, against original decree No. 2191 of 1890 of Colonel Hill, Civil Judge of the Civil and Military Station of Bangalore, dated the 13th day of August 1891.

(1) I. L. R. 4 Cal., 692. (2) I. L. R. 8 All., 324.

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while the suit by *T*, in which it was ruled that the property was his, was filed only in 1889 and *C* was no party to it.

Held also, that the lower court had no power to reduce the compensation awarded to *T* in a previous suit. Whether that decision was right or wrong, it was final and conclusive as between *T* and the parties to that suit. It was not open to the District Court to meddle with that decision in the present suit, the plaintiff not being at all concerned with the question of compensation nor having asked for any relief on that score.

On the facts found, the decree was modified.

The plaint in the case was :—

That by a registered deed dated 4th July 1881 defendants Nos. 2 and 3 and their deceased brother Narsimapa, father of defendant No. 4, for valuable consideration, to wit Rs. 8000, hypothecated to plaintiff a large number of family immovable properties situated within the jurisdiction of this Honorable Court and the jurisdiction of the Chief Court of Mysore, and amongst the aforesaid properties were included certain lands belonging to them situated in Blackpully and more particularly described at foot of plaint.

That defendant No. 1 in O. S. No. 160 of 1889 sued defendants Nos. 2 and 3 and their late brother Narsimapa, father of defendant No. 4, and also another brother named Rangia, who was a minor at the time of the hypothecation made to plaintiff in 1881, for the recovery of certain immovable, property to wit, some land being 2½ kolagas in extent inherited by him from his father Krishnia situate contiguous to the plots of land hypothecated to the plaintiff in Blackpully, on the ground that Hoovina Obalapa, the father of defendants Nos. 2 and 3, had been a trustee to defendant No. 1's father's estate, when defendant No. 1 was a minor, and had illegally obtained possession of the same and the defendant obtained a decree against his defendants for the recovery of his ancestral lands and executed his decree and obtained possession. Certain lands were awarded to defendant No. 1 according to a Commissioner's report and plan and together with Rs. 686-4-6 being sale-proceeds of land sold by his defendants and their late father to the Municipality and to third parties.

The lands originally belonging to defendant No. 1's father not being clearly distinguishable, this Honorable Court gave over to defendant No. 1, all the lands left, excluding the lands sold to the Municipality the sale proceeds of which were awarded to him as well as of lands sold to others, and by this decree defendant No. 1 obtained not only the lands he claimed as belonging to him but also those that had been hypothecated to the plaintiff.

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That the plaintiff instituted O. S. No. 4 of 1888 on the file of the Chief Court of Mysore, against defendants Nos. 2 and 3 and their brothers Narsimapa, since deceased, father of defendant No. 4 and Rangia and obtained a decree rendering liable all the hypothecated properties within the jurisdiction of that court, but the said court in that decree declared that Rangia having been a minor in 1881 his one-fourth share in all the lands hypothecated should be exonerated from liability to the plaintiff's claim.

That the plaintiff subsequently got the three-fourth shares of defendants Nos. 2 and 3 and the late Narsimapa in the lands hypothecated attached and sold by this court in execution No. 446 of 1890, in which defendant No. 1 intervened with miscellaneous application No. 89 of 1890 and he plaintiff himself purchased the said shares in Survey No. 1 of the said lands for a sum of Rs. 510 as per court sale certificate herewith produced.

That defendant No. 1 being entitled to 2½ kolagas of land he is entitled to retain possession only of so much out of the total area awarded to him as would make up that extent, after deducting the extent of land sold to the Municipality and to third parties for which the sale proceeds as compensation was decreed to him.

That the plaintiff is entitled for his three-fourth share to all the land left after deducting defendant No. 1's 2½ kolagas and the one-fourth share to which Rangia is entitled.

The cause of action accrued to the plaintiff on the 4th day of August 1890 when the plaintiff became the purchaser.

The plaintiff prays:—

That a decree be passed for possession of three-fourth share of survey No. 1 of the lands described at foot of plaint and for partition of the share by metes and bounds from the land to which defendant No. 1 is entitled and from the one-fourth share of Rangia with all costs and all such further or other relief as to the court may seem fit.

For defendant No. 1 it was contended that no more land than that decreed in O. S. No. 160 of 1889 was given to him that none of defendant No. 1's property was included in the hypothecation deed held by the plaintiff, and that the allegation in para 2 of the plaint that 2½ kolagas only of land were claimed by defendant No. 1 was incorrect, his claims being based on *Exs. Nos. I to IV* filed in O. S. No. 160 of 1889.

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The following issues were framed:—

I. Was more land handed over to defendant No. 1 than he claimed in O. S. No. 160 of 1889, and is he in possession of more land than was decreed to him?

II. Did he claim only 2½ kolagas of land as alleged in plaint or what was the extent of land to which he laid claim and was held to be entitled?

III. What extent of land is the plaintiff entitled to under the hypothecation deed and is such title good against defendant No. 1's occupation?

IV. To what relief, if any, is the plaintiff entitled?

1891 August 13.

The following judgment was passed by the District Judge *Col.* W. HILL:—

The grounds for this action are, that in execution of O. S. No. 160 of 1889 on the file of this court the whole plot as defined in the Commissioner's report has been assigned to the plaintiff in that case who is the present defendant No. 1, those mentioned in the plaint in the said suit being accepted as the correct boundaries of Angadi Krishnapa's land which was ordered by the decree to be restored to the said plaintiff (defendant No. 1 in this suit). The reason assigned for such delivery was the absence of any boundaries in *Ex. No. IV*, the sale deed in favor of Hoblia executed by Chowrama, daughter of Michalama, dated 28th July 1858, also because on measuring the plots of the adjacent gardens their size on an average corresponded with the seven plots described in *Ex. No. II* dated 22nd August 1846, being sale deed executed by Michalama to Angadi Krishnapa, the father of present defendant No. 1. The full amount of compensation for land sold by Balapa's father and Balapa to the Municipality (Rs. 686—11—6) was awarded to the present defendant No. 1 (plaintiff in previous case).

Now, in No. II the boundaries are described as east of Subiya's garden which as per Commissioner's plan lies to the west; next, north of Ramaya's garden which is found bounding the south; then, south of Chowraya's garden which is found likewise to bound the north; fourthly, to the west of Michalama's garden. The road to the public well is found to be on the east and beyond that buildings on Kolaraya's or shanbogue's land. It is in evidence that the road to the public well has been long in existence, so had it been the boundary of the holding it would have been so stated. Further there are old and survey accounts produced for the plaintiff. They show that Angadi Krishnapa's garden and Michalama's are each 2½ kolagas = 1250 square yards whereas the present hold-

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ing made over to defendant No. 1 is found to contain 3252 square yards. The survey accounts gives it as 1 acre. Besides this the survey account gives the whole holding of Hoblia taken as one including Angadi Krishnapa's, Michalama's, and Ramaya's (father of Hoblia) as 1 acre and 5 guntas.

1 acre = 4840 square yards.
6 guntas = 605

Gives 5445 square yards

compare this with old account. Ramaya's land is 5 kolagas 2 balas, padi $1\frac{1}{2}$; Krishnapa's $2\frac{1}{2}$ kolagas, Michalama's $2\frac{1}{2}$ kolagas, Total 10 kolagas, 2 balas, $1\frac{1}{2}$ padi. The account would be:—

10 kolagas = 5000 square yards.
2 balas = 250
$1\frac{1}{2}$ padi = $192\frac{1}{2}$

$5442\frac{1}{2}$ square yards.

or difference between these two calculations $4\frac{1}{2}$ square yards. This confirms the fact that Angadi Krishnapa's land was only $2\frac{1}{2}$ kolagas in extent. Therefore it follows that the plot should be divided into two and the western portion should be given to defendant No. 1 and the compensation reduced likewise by one half making Rs. 343-2-3 only payable to him.

Decree shall be prepared accordingly and the previous decree passed shall be so far modified. Each party shall bear their own costs as it was the conduct of the father of defendant No. 2 that had led to all this misunderstanding for he wrongfully appropriated the lands of defendant when a minor.

Both parties appealed to the Resident.

Mr. *J. Evers* for the plaintiff.

Mr. *H. Lubeck* for defendant No. 1.

The Resident (*Sir* H. N. D. PRENDERGAST) passed the following Remand Order in the appeals.

1892 *March* 19.

On the death of one Krishnapa in 1853, his widow Uchama took charge of his property, his son Thippia being a minor. She died in 1854 leaving a will whereby she devised certain property to

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Hoblia and four others in trust for the said Thippia. Subsequently the minor's property was made over to Government except a garden in Blackpully Road which Hoblia retained in his possession as purchased from Thippia and his mother Govindama in 1861. Portions of the land were sold to the Municipality and to other parties.

In 1889 Thippia brought a suit (O. S. No. 160) in the Court of the Civil Judge of the Civil and Military Station of Bangalore to recover possession of so much of the land as remained unsold and to obtain the sale proceeds of the rest.

Hoblia's sons Narsimapa, Balapa, Ramaswamy and Rangia, who were the defendants in the suit, contended that a portion of the land had been purchased from Thippia and his mother and that the other portion belonged to themselves. The Judge held that the alleged sale by Thippia and his mother was invalid and, there being no reliable evidence as to what portion of the land belonged to the defendants, gave a decree according to the plaint.

On appeal, this court reduced the amount of compensation payable to Thippia by Rs. 100 but in other respects confirmed the lower court's decree.

Chick Rudrapa, the present plaintiff, obtained a hypothecation of certain immovable property from Nursimapa, Balapa and Ramaswamy in 1881 and obtained a decree against them on the hypothecation in 1888, in the Chief Court of Mysore, which declared three-fourths of the hypothecated property liable to the debt. In execution of that decree Chick Rudrapa brought to sale three-fourths of the very land that had been decreed to Thippia and

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himself purchased it on the 4th August 1890. He brings the present suit to recover possession of the land and for its partition from Thippia's land and from the one-fourth share of Rangia which has been excluded by the decree of the Chief Court of Mysore.

Thippia's contention is that his land is not included in the plaintiff's hypothecation and that he is in possession of what belongs to and has been decreed to him.

The District Judge decreed the eastern half of the plaint-land to the plaintiff and reduced by one-half the compensation awarded to Thippia in O. S. No. 160 of 1889.

Both parties have appealed from that decree.

Four issues were settled in the case but there is not a distinct finding on any of them and the judgment is so brief and vague that it is not possible for this court to decide the suit on the materials before it.

It is argued for Thippia that the suit is barred as *res judicata.* No doubt it would be so barred if the plaint-land is not included in the plaintiff's hypothecation of 1881 and if the suit is barred on the sale-certificate. If, on the other hand, the land is included in the hypothecation, then under the rulings in *Bonomalee Nag* v. *Koylash Chunder Dey*(1) and *Sita Ram* v. *Amir Begam*(2) the suit would not be barred as *res judicata.* As the hypothecation deed has not been filed by the plaintiff, it is not possible for the court to say whether the plaint-land or any portion of it is included in the hypothecation or not?

(1) I. L. R. 4 Cal., 692. (2) I. L. R. 8 All., 324.

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The following issue is therefore referred for trial under s. 566 of the Code of Civil Procedure to the District Judge who will return his finding thereon, after taking such evidence as the parties may adduce on the point, within two months from this date.

Issue.—"Is the plaint-land or any portion thereof included in the hypothecation of 1881 executed in the plaintiff's favor by defendants Nos. 2 and 3 and the late father of defendant No. 4? If so, what portion, and what are its boundaries?"

The parties are allowed two weeks time to file their objections, if they have any, after receipt of the lower court's finding on the above issue.

The lower court having found that the plaint-land was included in the hypothecation made to the plaintiff by the defendants, the Appellate Court (*Colonel* P. D. HENDERSON, *Resident*) passed the following final Judgment:—

1892 *June* 25.

A summary of the case is given in the court's Order of the 19th March last, according to which an issue was referred to the District Judge for trial as to whether the present land or any portion thereof is included in the plaintiff's hypothecation of 1881. According to the finding received from him the plaint-land is included in the hypothecation.

Thippia, the appellant in R. A. No. 22 of 1891, has filed a memorandum of objections in which it is alleged that the District Judge's finding is inconclusive and that he has failed to specify the extent of the family property as distinct from the first property claimed by Thippia. I fail to see any inconclusiveness in the finding of the District Judge. He

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has recorded a distinct finding on the issue set down for trial and finds that the land in dispute is included in the plaintiff's hypothecation; he also gives the boundaries of that part of the hypothecated portion which includes the plaint-land. He was not asked to record findings on any other issue. Some other objections are also raised which do not refer to his finding.

In the decree under appeal, the late Civil Judge (Colonel HILL) awarded the western half of the plaint-land to defendant No. 1 (Thippia) and reduced the amount of compensation payable to him, to Rs. 343-2-3. From that decree both the plaintiff and defendant No. 1 have appealed.

The principal points raised for determination in the appeal of defendant No. 1 are (1) whether the plaintiff's suit is barred as *res judicata*; (2) whether the lower court was right in holding, on the evidence on record, that only half of the plaint-land must go to defendant No. 1 and (3) whether the District Judge was competent to reduce the amount of compensation awarded to Thippia in O. S. No. 160 of 1839.

With regard to the first point my learned predecessor has observed, in the order of remand above mentioned, that the plaintiff's suit would not be barred as *res judicata* if the land in dispute is included in the hypothecation of 1881. He has relied on the rulings in *Bonomalee Nag* v. *Koylash Chunder Dey*(1) and *Sita Ram* v. *Amir Begam*(2) respectively, in support of his view. No authority is cited by the appellant's advocate to show that this view is incorrect.

(1) I. L. R. 4 Cal., 692. (2) I. L. R. 8 All., 324.

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The decision in a suit can be binding on those only who are either parties to it or claim under them by a title arising subsequent to the commencement of that suit. This is the reasonable construction that ought to be placed upon s. 13 of the Code of Civil Procedure and it is supported by the above rulings. The hypothecation to the plaintiff took place in 1881, while the suit by Thippia in which it was ruled that the plaint-land is his property was filed only in 1889, and the present plaintiff was no party to it. I must therefore hold that the present suit is not *res judicata.*

As to the second point, from the evidence both oral and documentary it would appear that one Michalama had two pieces of garden adjoining each other. The western garden she sold to Angadi Krishnapa, father of Thippia, by *Ex. C* in 1846, and the eastern garden was sold by her daughter Chowriama to Hoblia in 1858 by *Ex. B.* In *Ex. C* the boundaries are given but not the extent. In *Ex. B* neither the extent nor the boundaries are specified. In 1861 Thippia and his mother sold the western garden to Narsimapa, son of Hoblia, by *Ex. A.* The two gardens were in the possession of Hoblia and after him in the possession of his sons. So the boundary marks, if any existed, between the two pieces have disappeared and it is now impossible to distinguish where the one ends and the other begins. The sale from Thippia and his mother to Narsimapa was found to be invalid in O. S. No. 160 of 1889, which Thippia brought against Hoblia's sons, on the ground that he was a minor at the time and that Hoblia was his trustee. As Hoblia had wrongfully retained posses-

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sion of Thippia's garden (the western piece) and his sons could not satisfactorily show how far it extended, the court held that the whole plot must be supposed to belong to Thippia and decreed it to him. As regards portions of the land sold by Hoblia and his sons to private individuals and to the Municipality, it was decided that Thippia was entitled to the sale proceeds by way of compensation.

According to the shanbogue's and other village accounts filed in the case, the extent of each of the above gardens is 2½ kolagas and the extent of Hoblia's flower garden adjoining them on the south is 5 kolagas and odd. The extent of the entire holding comprising the three pieces is, according to the survey accounts, 1 acre and 5 guntas, which, as explained in the judgment of the lower court, tallies with the above measurement. Under these circumstances the reasonable inference is that the two gardens were of equal extent. The District Judge was therefore right in holding that Thippia is not entitled to the eastern half of the plaint-land.

With regard to the third point, I think the District Judge is wrong. What was hypothecated to the plaintiff was the vacant ground in dispute; and what he purchased at court-sale is three-fourths of that. The lands occupied by the blocks of buildings to the east and west of the plaint-land and the land taken up by the Municipality for opening a road are not included either in the hypothecation or in the sale-certificate, for the sale of these portions took place prior to the hypothecation. The plaintiff, therefore, cannot claim compensation in respect to these portions.

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The decree under appeal merely declares that the amount of compensation payable to Thippia is reduced to Rs. 343-2-3. This apparently refers to the decree in O. S. No. 160 of 1889 in which Hoblia's sons were ordered to pay Rs. 686-4-6 to Thippia, being the sale-proceeds of lands sold by them and their father to the Municipality or to third parties. In R. A. No. 1 of 1890 this court reduced the amount to Rs. 586-4-6. Whether that decision was right or wrong it was final and conclusive as between Thippia and the defendants to that suit. It was not open to the District Judge to meddle with that decision in the present suit, in which the plaintiff is not at all concerned with the question of compensation and has not asked for any relief on that score.

One more point that has to be noticed in this case is, that the plaintiff is entitled to only three-fourths of the land under the sale-certificate and this is the prayer in the plaint. If Thippia is entitled to the western half of the plaint-land, then the plaintiff is entitled to only three-fourths and not the whole of the eastern half, for the remaining one-fourth must go to Hoblia's son Rangia, as his share is exonerated from liability to the plaintiff's claim.

In R. A. No. 25 of 1891, it is urged on behalf of the plaintiff that he is entitled to the whole of the plaint-land, that the lower court was wrong in decreeing to him half of the land and half the compensation, that the decree does not state who is to pay him the compensation amount, and that half the plaint-land ought not to have been allowed to Thippia as he has received the compensation amount, Rs.

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686-4-6, from the other defendants. These points have already been dealt with. It is wrong to suppose that the lower court has decreed half the compensation amount to him. The fact that Thippia in the former suit received from the other defendants more compensation than he was entitled to does not give the plaintiff any right over land belonging to Thippia.

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It is therefore decreed, in modification of the lower court's decree, that the plaint-land be divided into two halves, and three-fourths of the eastern half be made over to the plaintiff, and that each party do bear his own costs throughout.

Decree modified.

Before Colonel H. P. Peacock, Officiating Resident.

McDOWELL HAYES ROSS (PLAINTIFF) v. DORASAMI MOODLIAR AND OTHERS (DEFENDANTS).*

1892 *August 6.*

Limitation Act (XV of 1877), ss. 5 and 12 and Sch. II, Art. 156 —Decree not made out till five years after judgment—Code of Civil Procedure (XIV of 1882), ss. 205 and 215; Sch. IV, No. 132.

Judgment was delivered in a partnership suit on the 16th December 1886; but no decree was made out in the case till the 14th December 1891. The appellant claimed that limitation ran against him only from the latter date, and that he should be allowed the time necessary for obtaining copy of the decree then made: also that the court should in any case exercise in his favour the discretion permitted by s. 5 of the Limitation Act, as the delay was not caused by him but by the court or its officers.

Held that, as the Code of Civil Procedure requires the decree to bear the same date as the judgment, such date is the starting point for the ninety days allowed by Art. 156 of Sch. II of the Limitation Act, and not the date upon which the decree may happen

* Appeal No. 1 of 1892, against original decree No. 242 of 1885 of Colonel W. Hill, Civil Judge of the Civil and Military Station of Bangalore, dated the 16th day of December 1886.

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to be signed by the judge; that any time that may have elapsed before application for copy cannot be taken to be time requisite for obtaining a copy, and as the first application made by the appellant for copy of the decree was made more than a year after judgment had been pronounced, the appeal is barred by limitation.

Held further (on review) that as the appellant delayed applying for a copy of the judgment and decree for over a year, no reason exists why the court should exercise in his favor the discretion given by s. 5 of the Limitation Act.

Also, that though the judgment is too brief and does not fulfil the requirements of a final judgment, there is no doubt it was intended to be the final judgment in the case. There is nothing to show that the judge intended his judgment to be only a preliminary order; and the passing of a preliminary order under s. 215 of the Code of Civil Procedure, in the form No. 132 of Sch. II is not imperative under the section, but only permissive.

This was a suit for dissolution of partnership between the plaintiff and the defendants: and on the 16th December 1886, the following "Judgment" was passed by *Colonel* W. Hill, Civil Judge of the Civil and Military Station of Bangalore:—

The settlement of account having been made as shown in the report of the Commissioner and the same accepted by the court, the partnership between the plaintiff and the several defendants is declared to be dissolved. Each party shall bear their own costs.

On this no decree was issued up to 14th December 1891.

On the 8th December 1891, the Chief Clerk was called upon by the Judge on a petition by the plaintiff to explain why the decree was not made out and he reported "Institution fee not paid. Therefore decree was not prepared."

The District Judge thereupon ordered that "as the plaintiff is not entitled to recover any amount from the defendants, the institution fee has to be paid not by him but by those defendants who have been declared entitled to recover certain monies. A decree may therefore be now drawn in accordance with

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the judgment (called "Order") of this Court dated 16—12—86."

The case of *Ram Chunder Shaha* v. *Manick Chunder Banikyà*(1) was referred to on this point.

In accordance with the above order, the following decree was made out; and signed by the then District Judge on the 14th December 1891:—

Suit for dissolution of partnership between the plaintiff and the defendants and for the accounts of the partnership being taken.

On the passing of judgment in this suit in the presence of Messrs Hayes senior and Evers, advocates for the plaintiff, and Mr. Hayes junior, advocate for the 1st defendant, Mr. S. Smith, advocate for 2nd and 3rd defendants, Mr. Lawrance, advocate for 4th defendant, and Mr. Gomes, pleader for 5th defendant,

1. It is declared that the partnership in the plaint mentioned between the plaintiff and the defendants stand dissolved as from this day.

2. It is ordered and decreed that the sum of

Rs. 365 3 6 be paid to Aroonachellum Moodliar, the 1st defendant, as his share of the partnership assets.

That similarly,

Rs. 2,094 10 8 be paid to Thiroovengadasawmy Moodliar, the 2nd defendant, and

" 444 3 6 to Pootoosamy Chetty, the 4th defendant,

and that the above amounts be recovered from the undermentioned persons as follows:—

Rs. 879 0 0 from Mr. B. L. M. Ross, the 5th defendant;

" 1,492 0 0 from Mr. H. McD. Ross, the plaintiff;

" 532 0 0 from V. Vasoodeva Moodliar, the 3rd defendant.

3. And it is further ordered and decreed that each party bear his own costs incurred in this suit, as by memorandum annexed.

Given under my hand and the seal of the court this 16th day of December 1886.

(Signed) P. S. Krishna Row,
District Judge.
14th December 1891.

(1) I. L. R. 7 Cal., 428.

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The memorandum of costs annexed to this decree was also dated 14th December 1891.

Against this decree, the plaintiff preferred an appeal to the Resident in Mysore on the following grounds:—

1. That the judgment does not comply with the requirements of s. 203 of the Code of Civil Procedure.

2. That the decree does not follow the judgment as required by s. 206 of the Code of Civil Procedure.

3. That the terms of the decree are not to be found in the judgment, and it is impossible to draw up a decree from the judgment.

4. That the judgment is materially defective in not stating the shares of the respective partners, the values thereof and the amounts due to or by each of them.

5. That the report and accounts of the Commissioner, which the judgment states to be accepted by the court, contain gross and palpable errors.

6. That the judgment does not deal with the objections made by appellant to the said report and accounts; it gives no decision on such objections nor any reason for ignoring them.

7. That the judgment and decree are otherwise contrary to law and against the evidence in the case.

8. That although the judgment was given on the 16th December 1886, the decree was not drawn up and signed until the 14th December 1891 and copy thereof was not ready and delivered to the plaintiff on his application dated the 14th August 1891 until the 1st day of February 1892.

9. That this appeal is therefore within time under the ruling of the High Court of Calcutta in *Bani Madhub* v. *Gopal Chunder*.(1)

10. That the plaintiff therefore prays that this appeal may be admitted, that the judgment and decree of the lower court be set aside and that the case be remanded for proper disposal; and that this court will be pleased to grant such further or other relief as it may think the nature and justice of the case requires.

Mr. *Travers-Drapes* for the appellant.

Mr. *J. C. S. Lawrance* for respondents Nos. 2 and 10.

Mr. *J. W. Hayes, Jun.* for respondents Nos. 8 and 9.

(1) I. L. R. 13 Cal., 104.

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The judgment of the officiating Resident (*Colonel* H. P. Peacock) was as follows:—

This is a regular appeal from the judgment and decree of the Civil Judge of the Civil and Military Station of Bangalore, dated 16th December 1886. As a preliminary objection it is argued for the respondents that the appeal is barred under Article 156, Schedule II of the Limitation Act. For the appellant it is argued that, though the judgment was pronounced on the 16th December 1886, the decree was not signed by the court until the 14th December 1891 and that a copy thereof was not delivered to the appellant until the 1st February 1892.

Article 156, Schedule II of the Limitation Act limits the time for an appeal to the High Court to 90 days from the date of the decree. Section 205 of the Code of Civil Procedure lays down that the decree shall bear date the day on which judgment was pronounced. It follows therefore that the 90 days should be computed from the date of the judgment. Section 12 of the Limitation Act declares that in computing the period of limitation for an appeal the time requisite for obtaining a copy of the decree shall be excluded. Let us see now what steps the appellant took to provide for his appeal being filed within the limit. His first application for a copy of the decree was made on 19th December 1887 or more than a year after judgment had been pronounced; and it is explained that he did not apply for a copy knowing that no decree was in existence: he had however no reason to presume that a decree did not exist, otherwise why did he apply on 19th December 1887 when also the decree was not in existence. Or, leaving

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the question of the existence or non-existence of the decree out of the argument, he evidently knew by his application that such a course was necessary; then, why was not the application made, so that the appeal might be within the limit, instead of as already pointed out, more than a year after judgment had been pronounced. It would appear that the appellant was at first satisfied with the judgment; otherwise it is hard to understand why he delayed so long in applying for papers to enable him to file an appeal.

The full bench ruling in *Bani Madhub Mitter* v. *Matungini Dassi and others*(1), cited for the appellant, applies to a case in which application for copy of judgment was made before the appeal time had expired, but in the present case the first application for copy of the decree was not made until more than a year had elapsed since the judgment had been pronounced.

Any time that had elapsed before the application cannot be taken to be time requisite for obtaining a copy.

Article 156 of the Limitation Act must be read with s. 205 of the Code of Civil Procedure. To hold that the appeal time does not begin to run until the decree is prepared and signed by the court is to overlook the express provision of Article 156 of the Limitation Act, and to fix as the starting time a date which must vary in every case. Decrees are prepared at the convenience of the ministerial officers of the court and there is nothing to show when a decree is actually prepared and signed. It is not

(1) I. L. R. 13 Cal., 104.

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likely that it was intended that the appeal time should be reckoned from the date on which the decree is signed by the judge.

The appeal is in my opinion barred by limitation and is dismissed with costs.

Appeal dismissed.

The appellant presented an application for review of the foregoing judgment in the following terms:—

That on the 6th day of August 1892 the court was pleased to reject petitioner's appeal which was preferred against the decree of the District Court, Civil and Military Station of Bangalore.

That your petitioner desires a review may be granted of the judgment in such appeal on the following grounds, namely:—

1. That the court was wrong in holding that the right of petitioner to exclude the time during which the decree was not in existence depends upon petitioner having asked for a copy within ninety days, because it would have been absurd and useless for him to ask for a copy of what he knew did not exist.

2. That petitioner ought not to suffer for what was the neglect of the court.

3. That it will appear from the annexed affidavit that the reason why petitioner did not apply for a copy was that he was told on enquiry by the court that there was no decree made out and to wait till one was prepared.

4. That petitioner was therefore actually unnecessarily delayed by the court and its officers by reason of the decree not having been made out.

5. That this court has not considered the question as to whether petitioner should not be allowed the benefit of s. 5 of the Limitation Act.

6. That the court has not considered the effect of s. 215 of the Code of Civil Procedure taken in connection with Schedule IV, forms Nos. 132 and 133 of the same Code and that the order of the Civil Judge of the 16th December 1886 was only a preliminary order; and there was no final judgment or decree in the case nor anything that could be termed such until the decree was made or signed by the present District Judge on the 14th December 1891.

7. That s. 205 of the Code of Civil Procedure is inapplicable to the case, inasmuch as there was no judgment such as is contem-

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plated by the Code of Civil Procedure passed in the case, and the order of the 16th December 1886 must be deemed to have been passed under s. 215 and not to be a judgment.

8. That the case being thus still pending, the District Court should be directed to hear the parties and bring the suit to a final conclusion or a new trial should be ordered.

1893 *July* 27.

The Order of the Resident (*Col.* P. D. HENDERSON) on the review* was as follows:—

This is an application for review of this Court's judgment and decree of the 6th August 1892 in Regular Appeal No. 1 of 1892, which was dismissed as out of time.

It is argued for the petitioner that there was no negligence on his part, that he ought not to suffer for the laches of the court which delayed drawing up the decree, and that therefore this court ought to have exercised the discretion vested in it by s. 5 of the Limitation Act and admitted the appeal. These are all arguments urged before *Col.* PEACOCK who heard and decided the appeal. I am not satisfied that the view taken by him is erroneous and I see no reason to admit the appeal under s. 5 of the Limitation Act as petitioner delayed applying for a copy of the judgment and decree for over a year.

As an additional ground for granting the review it is argued that the judgment of *Col.* HILL was only of the nature of the preliminary order contemplated by s. 215 of the Code of Civil Procedure, and that there was no final judgment or decree in the case until the decree was made and signed by the present District Judge on the 14th December 1891. The section quoted, however is only permissive and ap-

*Civil Review Petition No. 14 of 1892 of appeal No. 1 of 1892 against original decree No. 242 of 1885 of the Civil Judge of the Civil and Military Station of Bangalore.

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plies to cases where a court deems it necessary to fix a special date for the dissolution of a partnership with a view to appointing a receiver and winding up a business. But it is not imperative upon a court to pass a preliminary order in the form given in No. 132 of the fourth schedule appended to the Code, before delivering a final decree, and there is nothing in the circumstances of this case to show that *Col.* HILL intended his judgment to be only a preliminary order.

A commission was issued to examine the accounts and submit a report embodying the result of the examination, and such a report was submitted to and accepted by the court before passing judgment. The judgment is too brief and does not fulfil the requirements of a final judgment; but still there can be no doubt that it was intended to be the final judgment in the case and that the decree was required to be drawn up conformably with the commissioner's report. The decree must therefore bear the same date as the judgment.

I see no reason to admit the review. The application is therefore rejected with costs.

Application for review rejected.

Before Colonel H. P. Peacock, Officiating Resident.

1892 *Sept.* 17.

CHICKA NIJAGOONAPA AND ANOTHER (PLAINTIFFS) *v.* SIDLINGAMA (RESPONDENT).*

Maintenance—Agreement by wife to surrender claims—Waiver by husband of rights under agreement—Power of mother to bind her minor daughter—Code of Civil Procedure (Act XIV of 1882), s. 34—Objections as to parties—Mother representing minor child in suit.

In a suit by a widow against her deceased husband's represen-

* Appeal No. 13 of 1892 against original decree No. 2681 of 1890, of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 19th day of April 1892.

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tatives for maintenance of herself and daughter and marriage expenses of the latter, an agreement made by the plaintiff with her late husband, by which she abandoned her claim to maintenance in consideration of the present payment of a lump sum, was set up by the defendants in answer to the claim.

It appeared that in maintenance proceedings subsequently t ken by the wife against the husband under the Code of Criminal Procedure, he did not set up the agreement, but consented to an order for a monthly allowance.

Held, that from the circumstances of the husband refraining to plead the agreement in the Magistrate's Court as a bar and consenting to an order for payment of a monthly allowance, it might reasonably be inferred that he knew the document had been obtained by unfair means or did not wish legal effect to be given to it: and that it could not therefore be raised to bar the present suit of the widow.

Held further, that a mother is not competent by such an agreement to bind her minor daughter and deprive her of the rights the law confers upon her.

It was also objected that the mother could not sue in her own name only for her minor daughter, who should be on the record in her own person as plaintiff.

Held, that as the objection can only be raised before the first hearing under s. 34 of the Code of Civil Procedure and when not so taken shall be deemed waived, it is to late too urge it on appeal.

Further, that the daughter being a minor, even had her name been placed on the record, she would only have been nominal plaintiff, her mother representing her in the conduct of the suit to all intents and purposes.

On the evidence, held that the lower court was right in finding the defendants to be in possession of the property of the deceased and that the same was liable to the plaintiff's claim. The amount decreed by the District Court not being excessive, its decree was confirmed.

This was a suit by a widow against the representatives of her deceased husband, who had his property in their possession, for maintenance of herself and her minor daughter and the marriage expenses of the latter.

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The District Court gave a decree to the plaintiff as follows:—

The result is that a decree will be given that the defendants do pay to the plaintiff a monthly allowance of Rs. 2 on account of her maintenance that they do pay to the plaintiff as guardian of her unmarried daughter a further allowance of Rs. 2 until the said daughter is married * * * ; that the defendants do pay to the plaintiff as such guardian a sum of Rs. 100 to defray the marriage expenses of the said daughter; that the plaintiff's maintenance be a charge upon the property referred to in the plaint and specified in *Ex. II* and that the defendants do pay to the plaintiff costs proportionate to the amount allowed in her favor.

The defendant appealed to the Court of the Resident in Mysore.

Mr. *Travers-Drapes* for the appellant.

Mr. *H. Lubeck* for the respondent.

The facts of the case sufficiently appear in the judgment of the Resident (*Colonel* H. P. PEACOCK) which was as follows:—

The plaintiff, widow of one Dodda Nijagoonapa, who died in October 1890, sues her younger brother, Chicka Nijagoonapa, and his son (by another wife) Nilakantapa for maintenance for herself and minor daughter and a marriage portion for the daughter out of the assets of her deceased husband, which are said to be in the possession of the defendants. The plaintiff asserts that the plaint-house is the joint property of her husband and the defendants and that it, together with the personal properties left by him, are in the possession of the defendants.

The defendants plead that the plaintiff waived her right to the maintenance of herself and daughter by the deed of release *Ex. 1* of 13th October 1884 which she executed in favor of her husband in consideration of a lump sum of Rs. 100 paid to her at the time;

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that the plaint-house had been sold to one Sidaveerapa so long ago as 1872, and that they are not in possession of any property belonging to the deceased.

The District Judge found that the deceased must have left some personal property; that the same is in the possession of the defendants; that the house in question is the joint property of the deceased and the defendants and that the release deed *Ex. I* has not been acted upon as a valid document and is therefore no bar to the present action.

In the plaint the plaintiff claimed maintenance for herself and daughter at Rs. 12 per mensem, Rs. 15 a year for clothing, Rs. 500 for the daughter's marriage expenses and Rs. 406, as the value of her ornaments said to be in the defendant's possession; and asked for a room in the house to live in. The District Judge gave a decree for Rs. 2 per mensem for the plaintiff's maintenance, Rs. 2 per mensem for her daughter until married and Rs. 100 for the daughter's marriage expenses and disallowed the rest of the plaintiff's claim.

The defendants appeal. The questions for decision in the appeal are, (1) whether the plaintiff is precluded by *Ex. I* from bringing the present action, (2) whether she could recover the marriage expenses of her daughter without joining the latter as plaintiff, (3) whether the house in question is the joint property of the deceased and the defendants, (4) whether the defendants are in possession of the personal effects of deceased and, (5) whether the amounts for maintenance and marriage expenses are excessive. With regard to the first point I consider the District Judge has rightly held that *Ex. I* was treated as a nul-

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lity and as if non-existent by the deceased himself and that it cannot therefore be used by the defendants in defence. About a month after execution of that document the plaintiff applied to the District Magistrate for maintenance under s. 488 of the Code of Criminal Procedure impeaching the document as having been obtained by fraud and force. Far from pleading the document as a bar to her claim, her husband quietly consented to pay her maintenance allowance at Rs. 4 per mensem and subsequently agreed to its being raised to Rs. 6 a month, a circumstance which goes to show either that he knew the document had been obtained by unfair means, or that he did not wish legal effect to be given to it. The plaintiff was not competent to bind her daughter by the agreement and deprive her of the rights the law confers upon her. The conduct of the plaintiff's husband does not leave it open to the defendants to rely on the agreement as a bar to the present suit.

As regards the second point I find that the objection that the daughter has not been made a plaintiff in the case is raised for the first time in appeal. Section 34 of the Code of Civil Procedure expressly lays down that all objections on the score of want of parties shall be taken before the first hearing and that any such objection not so taken shall be deemed to have been waived by the defendants. The objection cannot therefore be raised at this stage. Again, the daughter being a minor, even had her name been placed on the record she would only have been a nominal plaintiff, her mother representing her in the conduct of the suit to all intents and purposes.

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On the third point also the District Judge's finding appears to me to be correct. Though one house was formally conveyed by the deceased, the 1st defendant and their father to Sidaveerapa, father-in-law of the deceased, so far back as 1872, yet it would appear that the transaction was intended to defraud the previous mortgagee of the house. *Ex. B* shows that this view was taken of the transaction by a court of law in 1874. Although the finding in that case is not conclusive as between the parties to the present suit yet it serves to throw light on the true nature of the transaction. The fact that the plaintiff's husband and the 1st defendant were living in the house until the death of the former and that it is not included in the will left by the late Sidaveerapa lends confirmation to the view that Sidaveerapa was only an ostensible owner.

It was argued for the appellants that the District Judge gave them to understand that he would first of all consider whether *Ex. I* was a bar to the plaintiff's suit and, in the event of his decision on that point being against them, he would allow fresh evidence on the question of the house being ancestral property or otherwise, but that the judge decided the case at once. In support of this, attention is drawn to para 5 of the judgment wherein the District Judge says, "Having regard to these facts I think that, without requiring the parties to adduce fresh evidence on this point, I shall be justified in holding that the house referred to in the plaint and specified in *Ex. II* is the ancestral property of the plaintiff's husband." But on referring to the records I find that the

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District Judge has made no note to that effect. There is a distinct note made on the 26th March last, the last day of the hearing, that the defendants have closed their case, that arguments were heard and judgment was reserved. The judge would scarcely have made a note to this effect if the case had not been closed. In the same paragraph of the judgment the District Judge comments on the defendants' omission to call as a witness the tenant, a goldsmith, who is now in actual occupation of the house. Even after parties have closed their case the judge may require fresh evidence on any point to enable him to come to a decision, and it is perhaps to this that the District Judge refers in the above passage.

It is true that there is no evidence on the fourth point showing what personal property was left by the plaintiff's husband and came to the defendants' possession. But it is in evidence that he was a broker and a man of some means. It has not been shown that his personal property has gone to any persons other than the defendants. The District Judge was therefore right in presuming under the circumstances that the defendants are in possession also of the movable assets of the deceased.

As regards the fifth point, I do not think the amount awarded excessive. The plaintiff's daughter is now about nine years of age and the payment for her maintenance will continue until her marriage. The sum decreed for her marriage expenses does not appear excessive.

The decree of the lower court is confirmed and this appeal is dismissed with costs.

Appeal dismissed.

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Before Colonel H. P. Henderson, C. S. I., Resident.

TAJEE BEE AND OTHERS (PLAINTIFFS) *v.* MIDAKARA JAILABDEEN AND OTHERS (DEFENDANTS).*

Specific Relief Act (I of 1877), s. 42—Payment of rent by tenants—Constructive possession—Amendment of plaint—Code of Civil Procedure (Act XIV of 1882), s. 53, proviso.

A plaintiff out of possession cannot maintain a suit for mere declaration of title.

The party to whom tenants in possession of property pay rent, is the person who is constructively in possession of such property.

Held, on the facts, that the defendants were receiving rents from tenants, and so were in constructive possession and that the plaintiffs could not therefore under the *proviso* to *s.* 42 of the Specific Relief Act sue for a bare declaration, without at the same time asking for possession.

Held also, that the plaintiffs could not be permitted to amend their plaint by adding a prayer for possession, as that would be to convert the suit into one of another and inconsistent character.

This was a suit for declaration of the plaintiffs' title to certain property under a deed of gift to them from one Tenga Ali Saib. The facts appear clearly from the judgments of the original and appellate courts.

1892 *May* 27. The judgment of the District Court was as follows:—

The facts of the case are—

Tenga Ali Saib, the husband of plaintiff No. 1 and father of plaintiffs Nos. 2 and 3, was the original owner of the properties now in suit, *viz.,* premises bearing Municipal Nos. 3 and 139 in Ebrahim Street, as well as certain other properties. On the 24th May 1877 he conveyed all these properties to defendant No. 1 as per *Ex. B.* On the 22nd February 1890, he executed a deed of gift purporting to transfer the properties in suit to the plaintiffs. The case of the plaintiffs and their donor Tenga Ali Saib is that the conveyance of 1877 in favor of defendant No. 1 was merely a nominal transaction, the real ownership of the properties

* Appeal No. 15 of 1892 against original decree No. 590 of 1890 of Mr. P. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 27th day of May 1892.

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conveyed remaining with the vendor, Tenga Ali Saib; that possession has also remained with him and that he was therefore competent to make the gift in favor of the plaintiffs and hence they are entitled to maintain the present suit for a declaration of title without asking for possession under s. 42 of the Specific Relief Act.

The preliminary objection taken by the defendants is that, under s. 42 of the Specific Relief Act, the plaintiffs are not entitled to maintain the suit, as they are not in possession and should seek further relief in their plaint and stamp it according to the value of the properties involved in the suit.

The following preliminary issue was thereupon framed, *viz.*, whether the plaintiffs or the party through whom they derive their title or the defendants are in possession and enjoyment of the properties in the suit, and if so, from when?

A large mass of evidence, both oral and documentary, has been recorded on both sides. That on the plaintiffs' side is directed towards showing that the transaction evidenced by *Ex. B* was a nominal one, that no consideration for it passed at the time of its execution, that possession was not made over to defendant No. 1 as would have been done had the conveyance been a *bonâ fide* one, but that, in spite of the conveyance, Tenga Ali Saib continued in possession up to the date of the gift when he transferred it to the plaintiffs.

The evidence on the side of the defendants on the other hand is for the purpose of showing that *Ex. B* was a real conveyance, that consideration money for it was paid, that possession was transferred to defendant No. 1 on the date of the document and that since then he has been in possession.

The question whether *Ex. B.* was a real or nominal conveyance, is not necessary to be decided in this suit. That question will be decided when the occasion for it actually arises. The only point now to be determined is whether the plaintiffs or the defendants are in possession of the suit properties. On careful perusal of the evidence in the case I am of opinion that possession is with the defendants.

It is admitted on both sides that physical possession of the properties in suit has all along been with tenants. The only question is to whom they have been attorning or paying their rents. In this connection it is necessary to remember that *Ex. B* covers not only the suit properties, but also other properties; and if the plaintiffs' contention were true that they and their donor have been in possession and enjoyment of the suit properties, one would expect the

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other properties also to be in the possession of Tenga Ali Saib and not of the defendant No. 1. It appears however that this is not the case. From *Exs. IV, V* and *VII* it is clear that possession was transferred to defendant No. 1 on the date of *Ex. B* and that he was recognized as the landlord by the tenants. The evidence afforded by these documents coupled with the evidence of the defendants' witnesses who say that on the date of *Ex. B*, Tenga Ali Saib sent for his tenants and told them that they should thenceforth acknowledge defendant No. 1 as their landlord and pay rents to him shows that so far as the other properties already referred to were concerned, possession was duly made over to defendant No. 1 on the date of the conveyance *Ex. B*. With regard to the suit properties also I arrive at the same conclusion. *Ex. VI* relates to house No. 3, and with respect to the premises, No. 139, which have all along been in the occupation of the firm of Abdul Rahiman Saib and Co., though no rental agreement has been produced, there is enough of other evidence to show that the tenants regarded defendant No. 1 as their landlord. The very accounts of the firm on which the plaintiffs rely are all in the name of defendant No. 1 and several Tamil letters which the defendants have filed show that Ali Saib was recovering rents only as a relative or agent of defendant No. 1, and with the permission of the latter and that whenever the tenants had to make large payments, they did so with the previous permission of defendant No. 1. They show further that when Ali Saib acting in the interests of defendant No. 1 suggested to him the advisability of enhancing the rate of rent, the members of the firm wrote to defendant No. 1 signifying their assent to pay a higher rate. The exact position of Tenga Ali Saib in reference to this matter can be well understood from the Tamil letters filed by the defendants and marked *Exs. VIII* to *XXVII*.

* * *

These letters show unmistakeably that Ali Saib was receiving rents only by permission and not as owner of the Mundi in question and that possession in the eye of the law remained with defendant No. 1. That this was so understood by the parties themselves is clear from the evidence of defendants' witness Abdul Koodooz, who says that when a panchayet was convened to divide the properties of Ali Saib, some time before the date of the deed of gift *Ex. A*, and the latter wanted to have the suit properties also divided, he (the witness) said there was no use dividing the property before it was reduced into possession and that consequently the arbitration fell through. I have therefore no hesitation in

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finding the issue raised in favor of the defendants and against the plaintiffs.

It may be that there was some secret trust or agreement between Tenga Ali Saib and defendant No. 1 regarding the re-conveyance of the property in favor of the former and that by reason of such agreement, Ali Saib's representatives have certain rights against defendant No. 1, but the present suit is not for the enforcement of those rights. The suit as brought is therefore unsustainable and must be dismissed.

The plaintiffs' object in bringing the suit in its present form appears to be this. If either they or their donor Tenga Ali Saib sought to have the deed *Ex. B* cancelled and to recover possession of the properties covered by it either in whole or in part, they would have to pay the stamp duty on the value of such properties. This they wanted to avoid. Secondly, Ali Saib wanted to disinherit his son and grandson by his first wife who are not parties to this suit and he could not successfully effect this object even by making a will in regard to these properties. He therefore hit upon the plan of making a gift of the suit properties to the plaintiffs, whom he wanted to favor, pretending he was in possession of those properties, and then got the plaintiffs to file the present suit to have their title declared under s. 42 of the Specific Relief Act, alleging that they were in possession, with the evident object of getting an adjudication from the court on the question of possession directly and of title indirectly. This being the object of the plaintiffs and of Tenga Ali Saib in bringing this suit and the time of the court having been unnecessarily occupied in disposing of a question which does not affect the title of the parties, I am of opinion that the plaintiffs are much to blame for this litigation and they must therefore pay the defendants' costs.

The plaintiffs appealed to the Resident in Mysore on the question of possession.

Mr. *H. Lubeck* for the appellants.

Messrs. *J. C. S. Lawrance* and *T. S. D'Cruz* for the respondents.

1893 *Feb. 2.*

The judgment of the Resident (*Colonel* H. P. HENDERSON, C. S. I.) was as follows:—

The suit was for a declaration of the plaintiffs' right to hold the plaint-property and to restrain the

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defendants from asserting any claim thereto adverse to the plaintiffs.

One Tenga Ali Saib, husband of the 1st and father of the 2nd and 3rd plaintiffs, who was possessed of certain property including house and premises bearing Municipal No. 139 in Ebrahim Saib's street and house No. 3 situated at the back of the said house No. 139, conveyed the same to the 1st and 3rd defendants and to one Chanda Meah Saib, father of the 2nd defendant, by the sale-deed *Ex. B*, dated the 24th May 1877. On the 22nd February 1890 the said Tenga Ali Saib made a gift of the above houses by *Ex. A*, alleging that the sale to the 1st and 3rd defendants and Chanda Meah Saib was only a nominal transaction and that he was the real owner and was in possession of the property. In April 1890 the present suit was filed by the plaintiffs, who alleged in their plaint that Tenga Ali Saib was in possession of the suit property up to the date of gift and that they were in possession subsequent thereto. The defendants contended that the suit for a declaration was not maintainable, as they were in possession of the property in dispute and a preliminary issue was framed and tried by the District Judge as to "whether the plaintiffs or the party from whom they are said to derive title or the defendants are in possession and enjoyment of the property in suit and if so from when." The District Judge found that possession was with the defendants and dismissed the suit with costs as the plaintiffs had omitted to sue for possession.

The only point for consideration in this appeal, as in the court below, is whether the plaintiffs or the

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defendants were in possession of the suit property at the commencement of the suit. It is admitted that the premises in dispute have all along been in the occupation of tenants, but it is argued for the plaintiffs that the tenants were paying rents to Tenga Ali Saib up to the time of the gift, after which they attorned to the plaintiffs; while it is contended on behalf of the defendants that, if Tenga Ali collected any part of the rents at any time subsequent to the sale in their favor, he did so with their permission and as their agent. *Exs. Nos. IV, V and VII* are rental agreements executed by the tenants in favor of the 1st defendant in respect of other property covered by the sale-deed *Ex. B*, while *Ex. No. VI* is a rental agreement in favor of the same defendant in respect of plaint-house No. 3, all bearing date the 12th June 1877. Though there is no such rental agreement in respect of the plaint-house No. 139 in favor of any one, yet it is obvious from the documentary evidence that Tenga Ali Saib collected the rents with the permission of the defendants and probably as agent. As the District Judge observes, whenever the tenants had to make any large payments or to pay enhanced rent they consulted the 1st defendant and sought his permission. The accounts of the firm of Abdul Rahiman & Co., who were the tenants of the warehouse, No. 139, stand in the name of the 1st defendant and not of Tenga Ali Saib. The explanation now offered by the plaintiffs with regard to these facts is that the tenants did so in order to protect themselves against any future possibility of being sued by the defendants and that the accounts were opened in the 1st defendant's name in

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order to make them tally with the sale-deed. But the above facts are consistent with the defendants being not merely the nominal, but the real owners of the property. There is no documentary evidence to show that the tenants ever recognized Tenga Ali Saib as their landlord. It therefore follows that the defendants were, in the eye of the law, constructively in possession, the possession of the tenants being the possession of the landlord against third parties.

Some of the plaintiffs' witnesses state that the 1st defendant returned the sale-deed *Ex. B* to Tenga Ali Saib in their presence and desired the tenants of the warehouse thenceforth to acknowledge Tenga Ali Saib as their landlord, he being the real owner of the property, and that accordingly the tenants attorned to him and to the plaintiffs after the deed of gift. But I do not place any reliance on this oral testimony as it is not corroborated by anything in writing from the 1st defendant, which Tenga Ali Saib could and would have obtained if what is stated by the witnesses were true. Neither Tenga Ali Saib nor the plaintiffs have filed any rental agreements from the tenants in evidence of the alleged attornment, which I cannot therefore accept as true. Only a month and a few days elapsed between the date of the gift and the institution of the suit. If the tenants were induced to make any small payment as rent to the plaintiffs during that short interval or to make any entries in their accounts without the knowledge and consent of the defendants, that cannot transfer the legal ownership or possession from the defendants to the plaintiffs.

The legal title and possession remained with the

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defendants, Tenga Ali Saib having failed to get the property reconveyed to himself. I therefore decline to interfere with the finding of the District Judge.

The plaintiffs' advocate asked that in the event of the court upholding the finding of the District Judge, the plaintiffs might be permitted to amend the plaint by adding a prayer for possession and the lower court be ordered to try the suit as so amended. There is no such prayer in the appeal memorandum, but even if there were, I do not think that the proposed amendment could be permitted. For, as a general rule, the amendment must be consistent with the case as originally put forward—*Mukhoda Soondury Dasi* v. *Ramchurn Karmokar*(1); and a party must be limited to the case which he puts forward in his plaint. The plaintiffs chose to assert distinctly in their plaint that they were in possession of the property and asked only for a declaration of their title. After having come to trial on the question of possession, they cannot be allowed to abandon their original position on seeing the findings of the two courts go against them, and present a new case altogether—*Shibkristo Sircar* v. *Abdool Hakeem*(2). The case of *Terietput Singh and others* v. *Gossain Sudersan Das*(3) seems also to be in point.

Moreover the effect of the amendment would be to alter the nature of the suit, which is opposed to the proviso of s. 53 of the Code of Civil Procedure.

The decree of the lower court is therefore confirmed and this appeal is dismissed with costs.

Appeal dismissed.

(1) I. L. R. 8 Cal., 871. (2) I. L. R. 5 Cal., 602.
(3) I. L. R. 4 Cal., 46.

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Before Colonel P. D. Henderson, C. S I., Resident.

1892 Nov. 26.

ZYNABI (DEFENDANT) *v.* MAHOMED KHAN (PLAINTIFF).*

Mahomedan law—Burial ground—Resumption of land dedicated as a cemetery—Specific relief—Damnum absque injuriâ—Objection first raised in appeal—Damages—Costs.

The defendant had built a house upon land forming part of a disused Mahomedan cemetery where the plaintiff's brother had been interred.

The plaintiff sought to have this building removed and his brother's bones reinterred and to be permitted according to Mahomedan custom to offer up prayers at the grave.

Held that under Mahomedan law when once land is dedicated to the use of the public as a cemetery and people have been buried in it, it is not competent to the original proprietors of the land, even after it has ceased to be used as a burial ground, to convert it to their own use so as to debar the relatives or descendants of the dead whose remains are interred in it from performing the religious rights enjoined by the Mahomedan religion. The acts of the defendant constituting an injury not only to the religious feelings of the relatives of the dead but also to their legal rights, the suit is maintainable.

Further, it being a matter in which religious feelings are wounded any pecuniary compensation that could be awarded might not be an adequate relief for the injury sustained, therefore specific relief is the correct remedy.

The objection that the alleged grave occupied only one-fourth part of the building ordered to be removed not having been raised in the lower court, ought not to be entertained on appeal.

As costs are a matter in the discretion of the lower court, which did not seem to have exercised such discretion wrongly, the decree in that respect should not be interfered with.

The facts of the case appear sufficiently for the purposes of this report in the judgment of the appellate court.

Mr. *H. Lubeck* for the appellant.

Mr. *J. Evers* for the respondent.

* Appeal No. 16 of 1892 against original decree No. 1700 of 1891 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 14th day of June 1892.

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The judgment of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

The following are the facts of the case. There is a graveyard known as Alafkhan's Makan in Chikka Bazar road, in the Civil and Military Station of Bangalore, which was in use as a burial ground by a certain section of the Mahomedan community till 1861, when it was closed by order of the Municipality. Before it was so closed the plaintiff had buried in a corner of the makan the remains of his brother, Lalkhan. In March 1891 the defendant levelled the grave and built a small shop over it for which she was convicted by the Second Magistrate under s. 297 of the Indian Penal Code and sentenced to pay a fine of Rs. 25. The conviction and sentence were quashed by this court on revision, mainly on the ground that the building having been erected by the defendant with the permission of the Municipality, the case came under s. 79 of the Indian Penal Code.

After disposal of the case before the Second Magistrate but before the revision petition was filed in this court, the plaintiff instituted this suit in which one of the reliefs claimed is that the remains of Lalkhan be re-interred or restored to their former place in the graveyard. Other reliefs claimed, which were disallowed by the lower court need not here be noticed. The defence to the suit is that the defendant built the shop in question on vacant ground without disinterring any bones and without any knowledge of the plaintiff's brother's remains having been buried there, and that the suit is not maintainable as no right of property rests in the plaintiff.

The finding of the District Judge on the issues

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framed is that the remains of the plaintiff's deceased brother were interred in the grave now built upon and that the plaintiff has a right of access to the grave for the purpose of offering prayers, &c. The District Judge therefore gave a decree directing the defendant to remove the building and permitting the plaintiff to restore his brother's bones to their former place and to exercise his right of going to the spot to say *fatihas*, &c. The rest of the plaintiff's claim was rejected and each party was directed to bear his or her own costs of the suit.

The defendant appeals from that decree, and the plaintiff has filed a cross-appeal against that part of the decree which disallowed his costs.

The grounds urged in the defendant's appeal are—

(1) that there is no adequate proof of the land utilized for the burial having been purchased;

(2) that if any small sum was paid, it was more in the nature of an honorarium, and as such the payment conferred no rights on the heirs of the deceased;

(3) that the identity of the spot was not established;

(4) that the defendant did not disinter the remains of the plaintiff's brother;

(5) that plaintiff's rights, if any, can be only for damages which he has not claimed; and

(6) that the lower court is wrong in decreeing the amount of the whole building when only a fourth part of it possibly covers the site in suit.

The plaintiff swears that he paid Rs. 5 to Alafkhan, the owner of the cemetery as the price of the grave. This is admitted by Alafkhan's son, Amin-

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khan, who dug the grave and is corroborated by the 4th witness who was present at the burial. Attention is drawn by the appellant's advocate to the contradiction between the plaintiff's statement in the suit and his deposition (*Ex. 1*) in the criminal case as regards the payment of the Rs. 5. In the criminal case the plaintiff appears to have stated that he paid the Rs. 5 into Alafkhan's hands while in the civil suit he deposed that he paid the amount into Aminkhan's hands. This is not a material contradiction and is more apparent than real, for it appears from the evidence that Alafkhan and his son Aminkhan were both present and that the Rs. 5 was paid to Aminkhan who passed it on to Alafkhan then and there.

Even if the money was paid as an honorarium and not as price for the land, Alafkhan and his heirs are not, it seems to me, at liberty to use the land for whatever purpose they like after once setting it apart as a cemetery. Under Mahomedan law the rights of property vesting in the owner of land abate when it is set apart as a cemetery and people have been buried in it (*see* Baillie's Mahomedan Law, 2nd ed., p. 620). A body once interred cannot be exhumed without some excuse and it may be lawfully exhumed only when it appears that the land was usurped or another is entitled to it under a right of pre-emption (*Ibid*, p. 621). When a cemetery in a village has gone to decay without any traces of the dead, not even bones, it is not lawful to sow the land and take its produce, as in legal effect it is still a cemetery (*Ibid*, p. 622). I am therefore of opinion that under Mahomedan law, after land is dedicated

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to the use of the public as a cemetery and people have been buried in it, it is not competent to the original proprietors of the land, even after it has ceased to be used as a burial ground, to convert it to their own use so as to debar the relatives or descendants of the dead whose remains are interred in it from performing the religious rights enjoined by the Mahomedan religion.

In the present case the plaintiff has interrupted their rights by levelling the ground and building a shop over it, even though she may not have dug up the bones. It is an injury not only to the religious feelings of the relatives of the dead but also to their legal rights. The suit is therefore maintainable.

The contention that the plaintiff is entitled to only damages, if anything, and not to the specific relief granted by the lower court does not appear to me to be a sound one. This is a matter in which religious feelings are wounded and any pecuniary compensation that could be awarded might not be adequate relief for the injury sustained.

As for the objection that the identity of the plaintiff's brother's grave has not been sufficiently proved, I think the plaintiff has adduced all the evidence available on the point. The grave was marked by specific trees and by a stone, all of which have been removed, and a human skull and bones were found in the place pointed out by him. He and his witnesses swear that the spot where these were found is his brother's grave. We cannot look for better proof in a case of this nature where the burial took place thirty years ago.

It is urged that the alleged grave occupies only

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a fourth part of the building ordered to be removed. There is nothing on record to show the exact measurement of the grave, or of the building, and the objection does not seem to have been raised before the lower court. Such being the case I decline to take notice of the objection at this stage.

The cross-appeal relates to costs disallowed by the lower court. The awarding of costs is a matter left to the discretion of the court. Seeing that the plaintiff asked for reliefs which were not all decreed to him, I am not satisfied that the lower court has wrongly exercised the discretion vested in it by law.

The cross-appeal is therefore disallowed.

For the reasons above given the decree of the lower court is confirmed and the appeal dismissed with costs.

Appeal dismissed.

Before Colonel P. D. Henderson, C. S. I., Resident.

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Dec. 6.

HAZARAM BI AND OTHERS (DEFENDANTS) KOOLSUM BI AND OTHERS (PLAINTIFFS).*

Arbitration—Validity and finality of award—Enlargement of time by implied consent—Arbitrators functi officio after award given—Suit barred by award—Transfer of Property Act (IV of 1882), ss. 38 and 53—Bonâ fides—Costs—Grant of more relief than sought for in plaint—Contingent award—Separate suit.

The heirs of a deceased Mahomedan referred to six arbitrators the division of the estate. The submission required the arbitrators to make their award within one week and empowered them to make a division of all property movable and immovable according to Mahomedan law.

A unanimous award was made by the arbitrators, on a date beyond the week specified, the purport of which was that in the event

* Appeal No. 18 of 1892 against original decree No. 589 of 1891 of Mr. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 15th day of June 1892.

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of A (the son) retaining all his father's property he should pay within exactly one month a certain sum to B (the widow), and that if he failed so to pay, B should retain a certain bungalow and pay to him a certain sum.

Some time after this award the arbitrators met and recorded a proceeding to the effect that they had exceeded the authority conferred on them by the submission, in having allotted to B a money share instead of specific property: and again on a later date the arbitrators recorded further opinions (differing) as to the finality and validity of their award.

About three months after this A sold the bungalow and tendered to B the amount specified in the award, which was refused and a suit was filed by her to recover her widow's share and dower and to set aside the alienation of the bungalow.

Held, that, though the wording of the deed of submission was vague, it seemed only to imply that the proceedings were to commence in a week, as they did: but even if the time for making the award were by the deed limited to a week, the subsequent conduct of the parties in not objecting and in attending meetings of the arbitrators after the week had expired, showed that they gave their implied consent to the extension of the period.

Further, the deed of submission simply empowered the arbitrators to make a division of all the property according to Mahomedan law. It in no way restricted the mode of effecting such division. The Mahomedan law merely declares the shares of heirs but is silent as to the method to be adopted in making a division. The mode adopted by the arbitrators was a common-sense one and not prohibited by the deed of submission. The parties did not wish the property to pass out of the family and the fact that each intimated to the arbitrators the highest amount for which he would purchase the several buildings and did not object to the arbitrators method of estimating their value showed that the mode of division adopted by the latter was not unforeseen or unauthorised. The arbitrators therefore acted within their authority in dividing the property as they did.

Further, the award of the arbitrators was final. The proceedings up to that point were conducted regularly and carefully and the decision of the arbitrators was unanimous. Their award was reduced to writing, signed by all and complete in itself, so far as regarded its legal operation. It left no points undecided.

Further, the subsequent proceedings of the arbitrators, after a doubt as to the legality of the award had for some reason or other made its way into their minds, were nugatory, for as soon as the

award was made the authority of the arbitrators was at an end. They were not at liberty to exercise a fresh judgment in the case and alter the award in any particular. They were so entirely *functi officio* that they could not even have corrected a manifest error in the calculation of figures.

Therefore, the award being final and valid a suit independent of it was not maintainable: only one to enforce it could be brought, and the present suit must therefore fail.

Further, the award having directed the money due to *B*, the plaintiff, to be paid within exactly one month, and failure in payment within the time having been made, the rest of the award took effect and the bungalow vested in the plaintiff subject to payment by her of the other sum mentioned. This was the legal effect of the award, which it was not open to the arbitrators or the parties to vary. The purchasers did not, it is true, purchase for an inadequate sum, but knowing, as they did, that the plaintiff had an interest in it, they did not take proper measures to obtain her consent. They could not therefore be said to have acted *bonâ fide* and were not protected by *ss.* 38 and 53 of the Transfer of Property Act. The sale was therefore invalid and must be set aside.

Each party to bear their own costs throughout, inasmuch as the plaintiff brought the suit ignoring a valid award and as the vendor of the property acted in excess of his rights under the award and the purchasers took it with full knowledge there were others interested in it without obtaining their sanction.

Held (*on review*) that the plaintiff cannot be granted greater relief than the plaint asked for nor more than the suit as framed would entitle her to. The award being contingent in its effect, the rights of the parties depended upon the fulfilment or otherwise of the conditions imposed by it, a question resting on evidence and best determined in a separate suit.

The decree was therefore modified as regards the setting aside of the sale.

The facts appear sufficiently from the judgment of the appellate court.

Mr. *Lubeck* for the appellants.

Mr. *Evers* for respondent No. 1.

Mr. *Sambasivia* for respondents Nos. 2 and 3.

The Judgment of the Resident (*Colonel* P. D. HENDERSON) was as follows :—

In this case the plaintiff, a Mahomedan widow,

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sues to recover her one-sixteenth share and her dower of Rs. 750 out of the estate of her late husband, Hamid Saib, who died in about November 1887. Defendant No. 1 is his junior widow and defendants Nos. 4, 5 and 6 are her daughter and sons by her. Defendants Nos. 2 and 3 are his daughters by the plaintiff, and defendants Nos. 7 and 8 are the purchasers from defendant No. 5 of a bungalow which is one of the properties left by the deceased. The plaintiff sues further to set aside the alienation of the bungalow by defendant No. 5, to defendants Nos. 7 and 8.

To understand clearly the pleas put forward by the several defendants it is necessary to state briefly the circumstances which led to the institution of the present suit. Some time after Hamid Saib's death family disputes evidently arose regarding the distribution of the property and the matters in dispute were referred to private arbitration by a deed of submission dated the 4th September 1890 signed by all the claimants. After holding two sittings on the 7th and 8th September and after examining some of the parties and others, the arbitrators, who were six in number, delivered a unanimous award on the 21st September, the purport of which was that in the event of defendant No. 5 retaining all his father's properties, he should within exactly one month from date of the award pay to the plaintiff and her daughters Rs. 2,318-4-6 for their shares inclusive of the plaintiff's mahar and that if defendant No. 5 should fail to pay this amount within the time fixed, the plaintiff and her daughters should retain the bungalow in Cole's Park, paying in cash Rs. 1,371-11-6 to defendant No. 5. The award further stated that

"the remaining settlement" was deferred till the 21st October.

On the 11th October 1892 the arbitrators met and recorded a proceeding to the effect that they had exceeded their authority under the terms of the *muchalika*, in allotting to plaintiff and her daughters the money value of their shares instead of a specific portion of the immovable properties, and they postponed to a later date the consideration of certain notices which had been issued to them raising this objection to the award. On the 27th October two of the arbitrators recorded as their opinion that the one week's time fixed in the deed of submission having elapsed, no decision was needed, while another arbitrator was of opinion that the decision should be reserved till the following day, and a fourth arbitrator recorded his opinion that the decision of the 21st September was final, valid and binding on the parties. The remaining two arbitrators do not appear to have been prepared at the last day's meeting.

Alleging that the plaintiff and her two daughters were only entitled to the money value of their shares under the award of the 21st September, defendant No. 5 conveyed the bungalow to defendants Nos. 7 and 8 under a sale deed dated 7th February 1891 for Rs. 4,600 and he offered to pay through his advocate to the plaintiff and her daughters the amount due to them under the award of the 21st September. The plaintiff refused to accept the tender and filed this suit in March 1891.

Now the plea of defendants Nos. 1, 4, 5 and 6 is that the award of the 21st September 1890 was final, valid and binding on the parties, and is a

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bar to the plaintiff's suit; that the one month's time allowed to defendant No. 5 for raising the money payable under the award to the plaintiff and her daughters having been extended with their consent by the arbitrators, he conveyed the bungalow to defendants Nos. 7 and 8 with the knowledge and consent of the arbitrators and of the parties concerned, and that therefore the suit which has been brought independently of the award is not maintainable.

The defence of defendants Nos. 7 and 8 is that they are *bonâ fide* purchasers for value and that the sale in their favor is neither illegal or fraudulent.

Defendants Nos. 2 and 3 support their mother's claim.

The District Judge has found that the award of the 21st September was neither final nor valid, that the arbitration fell through, that the sale to defendants Nos. 7 and 8 is invalid inasmuch as it was not *bonâ fide* and was effected without the sanction of the plaintiff and her daughters, and that the suit is therefore maintainable. Accordingly he has set aside the sael and given a decree in the plaintiff's favor.

9. The contending defendants have preferred this appeal in which the points for determination are (1) whether the award of the 21st September was final, valid, and binding on the parties; (2) whether the suit brought independently of the award is maintainable; (3) whether the plaintiff's claim to mahr is barred by the Statute of Limitation; and (4) whether the sale of the bungalow to defendants Nos. 7 and 8 is invalid, and if so, to what extent.

With reference to the first point, I cannot agree

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with the District Judge in his finding that the award of the 21st September was neither valid nor final. The two objections raised against the validity of the award are that it was passed after the expiry of the one week specified in the deed of submission, and next that the deed of submission only authorized the arbitrators to make an allotment of the specific movable and immovable properties of Hamed Saib according to Mahomedan law, and not to award to the plaintiff and her daughters the value of their shares in cash. As to the first objection, the wording of the deed of submission is certainly somewhat vague, but it seems to me that it can only imply that the proceedings were to commence in a week, as they did. It could hardly be expected that arbitrators who have other affairs to attend to, would arrange meetings, examine witnesses, fix issues, deliberate and record a decision in such a case within a week. They seem to have acted with reasonable promptitude, assembling in three days after the 4th September and completing their award by the 18th. But, even supposing that the parties originally intended that the arbitrators should conclude their proceedings within a week from the date of the deed of submission, their subsequent conduct shows that they consented to the extension of the time. There may be cases in which time is of the essence of the contract, and in such cases the award must be made within the limit fixed by the submission unless further time be subsequently allowed in specific terms. Where reference to arbitration is made by order of a court, the court has the power, under s. 514 of the Code of Civil Procedure to enlarge the period for the delivery

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of the award. There is no corresponding provision in the Code applicable to private awards, and we may therefore, I think, fall back upon the general principle of the English law of submissions and awards, so far as they are applicable. The following is from Russell on Arbitrators (2nd ed. pp. 143 and 144)—

"If the submission contain no power for enlarging the time, or if when there is such a power "it has been omitted to be exercised, and the original time has elapsed without an award being "made, the authority of the arbitrator may be "revived and further time granted by the consent of "the parties. . . . . . . The conduct of the "parties will often be taken to amount to a consent "on their parts to an enlargement of the time and a "consequent continuation of the arbitrator's authority. If after the time has expired without an "enlargement or where an invalid enlargement has "been made, they attend further meetings before "time with a full knowledge of the circumstances "and without making any objection on that ground, "they will be precluded from saying that the authority of the arbitrator was at an end . . . "

The above extract shows that the original time for making an award may be extended by consent of the parties either express or implied. In the present case, after the expiry of the week fixed in the deed of submission the parties did not object to the authority of the arbitrators to proceed, but on the contrary gave their implied consent to the extension of the period, by attending the subsequent meetings of the arbitrators. Therefore the objection taken on the ground of the award having been delivered after one week falls to the ground.

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The second objection also cannot in my opinion stand. The deed of submission simply empowers the arbitrators to make a division of all properties movable and immovable according to Mahomedan law. It in no way restricts the mode in which the division was to be effected by them. The Mahomedan law merely declares the shares to which each class of heirs is entitled but is silent as to what method is to be adopted when actually dividing the properties between the several heirs. Therefore we are to follow the common-sense view which suggests that when property cannot be divided without destroying its intrinsic value the person or persons entitled to a share must take its money value in its stead. This is the view taken by the Calcutta High Court in *Ashanullah* v. *Kali Kinkur Kur and others*(1) and is the principle adopted in s. 396 of the Code of Civil Procedure. The mode of division adopted by the arbitrators is one that would commend itself to practical common-sense persons and is not prohibited by the deed of submission. The parties did not wish that the properties should pass out of the family and the fact that each party intimated to the arbitrators the highest amount for which he would purchase the several buildings and did not object to the arbitrators' method of estimating the properties show that the mode of division adopted by them was not unforeseen or unauthorized. Moreover *Ex. VI*, which is a notice on behalf of the plaintiff and her daughters, dated 23rd July 1890, addressed to defendant No. 1, clearly shows that the plaintiff at that date, which was only a month

(1) I. L. R. 10 Cal., 675.

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or so before the deed of submission, demanded a money payment for her share and *mahar* and for the shares of her children. I hold, therefore, that the arbitrators acted quite within their authority in dividing the properties as they did.

The next question to be considered under the first point is whether the award of the 21st September was final. On this point also my answer is in the affirmative. The proceedings up to that point appears to have been conducted regularly and carefully, and the unanimous decision of the arbitrators was that, in the event of defendant No. 5 retaining all the properties for himself, he should pay a certain sum to the plaintiff and her daughters and another sum to a creditor within one month, but that if he failed to do so, the bungalow should go to the plaintiff and her daughters, who were to pay the difference between the value of their shares and the estimated value of the properties to defendant No. 5 and his party. On either of these events happening the party recovering the money payment was to execute a deed of release renouncing its rights in the properties. The award was reduced to writing and signed by all the arbitrators, and is complete in itself so far as its legal operation is concerned. The "remaining statement" which was deferred till the 21st October clearly refers to the execution by one or other of the release and not to the determination of any matters submitted to arbitration, for there were as a matter of fact no points left undecided.

The concluding sentence of the award runs thus —"Those heirs who wish to have a copy of this " decision are required each to bring a stamp paper

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"of one rupee within six days and deposit the copying fees and obtain the copies from the punchayet. "The account books marked Nos. 4, 5 and 6 were "returned to Abdul Ghani." This shows unmistakably that the arbitrators intended the award to be final.

The subsequent proceedings of the arbitrators, after a doubt as to the legality of their award had for some reason or other made its way into their minds, were nugatory, for as soon as the award was made the authority of the arbitrators was at an end. They were not at liberty to exercise a fresh judgment in the case and alter the award in any particular. They were so entirely *functi officio* that they could not even have corrected a manifest error in the calculation of figures. (*See* Russell on Arbitrators p. 144). After an award has been made and handed to the parties the functions of the arbitrators cease absolutely and they have no power afterwards to deal with an application for review of their decision. See *Dutto Singh* v. *Dosad Bahadur Singh*(1).

My decision on the first point therefore is that the award of the 21st September 1890 was final, valid and binding on the parties.

With regard to the second point I hold that the suit which has been brought independently of the award is not maintainable. A valid award cannot only be enforced by suit (*Palaniappa Chetti* v. *Rayappa Chetti*(2)) but may also be pleaded as a defence (Russell on Arbitrators pp. 539, 543 and 547). As the award in this case has been found to be final and valid, the plaintiff could bring a suit

(1) I. L. R. 9 Cal., 575. (2) 4 M. H. C. Rep., 119.

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to enforce the award and cannot sue independently of it. The suit to recover her share and *mahar* must therefore fail.

The third point, *viz*, whether the plaintiff's claim to *mahar* is or is not barred by limitation, need not be considered, as it has been found that the plaintiff has no right to sue independently of the award.

The only question remaining for determination is whether the sale to defendants Nos. 7 and 8 is valid or not. On this point I fully concur with the District Judge. They did not, it is true, purchase the bungalow for an inadequate sum, but knowing, as they did, that the plaintiff and her daughters had an interest in it they did not take proper measures to obtain their consent. They cannot therefore be said to have acted *bonâ fide* and ss. 38 and 53 of the Transfer of Property Act quoted by the appellants' advocate do not protect them. In these circumstances, if there had been no valid award, the sale would have been invalid only so far as it affected the rights of the plaintiff and her daughters. But the award having been found to be valid and binding, we are to see what are the powers of defendant No. 5 under it to dispose of the bungalow. It is contended that the plaintiff, her daughters and the arbitrators gave their verbal consent to the extension of one month's time within which defendant No. 5 was to have paid the plaintiff and her daughters their shares in money, and that the sale to defendants No. 7 and 8 was made with their knowledge and consent. There is no documentary evidence of such consent and I do not believe the verbal evidence adduced on the point. Assuming that there was

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such consent as is now alleged, that cannot modify or alter in any way the express terms of the award. After the award was made the arbitrators had no authority to extend the period and thereby modify the latter part of the award. They were *functi officio* as already observed and I doubt if the parties themselves were at liberty by mutual verbal agreement to vary the express terms of the award. Defendant No. 5 was bound to pay the money due to the plaintiff and her daughters as fixed in the award within exactly one month from the date of that document. Having failed to do so, the rest of the award takes effect and vests the bungalow in the plaintiff and her daughters subject to payment of the sums mentioned. This was the legal effect of the award which it was not open to the arbitrators or the parties to vary. On the 7th February 1891, the date of the sale in favour of defendants Nos. 7 and 8, the bungalow belonged to the plaintiff and her daughters, and not to defendant No. 5 and his party; the sale is therefore invalid.

The result is that the lower court's decree is confirmed, so far as it sets aside the sale of the bungalow in Cole's Park by defendant No. 5 to defendants Nos. 7 and 8 as invalid, but it is reversed in other respects and the plaintiff's suit is dismissed, but without prejudice to her rights under the award of the 21st September 1890.

As on the one hand the plaintiff brought her suit ignoring a valid award, and as on the other hand defendant No. 5 acted in excess of his rights under the award, and defendants Nos. 7 and 8 purchased the property with full knowledge that there were

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1892 others interested in it without obtaining their sanction, I direct that each party do bear his or her own costs of the suit throughout.

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Appeal allowed in part. Suit dismissed.

The appellants applied for a review* of the above judgment on the grounds that it gave a larger remedy than the plaint asked for and that the question of the validity of the sale ought to be determined in a separate suit.

Messrs. *Lawrance, D'Cruz* and *Lubeck* for the appellants.

Messrs. *Travers-Drapes* and *Evers* for the respondents.

1893 *October* 7. The Judgment on review of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

The facts of the case having been fully stated in the former judgment of the 6th December 1892, it is unnecessary to repeat them here. The appellants applied for a review of the judgment and decree which was granted by the order passed on Review Petition No. 1 of 1893, dated the 26th July 1893.

This court in its former judgment discussed the question whether the sale of the bungalow in Cole's Park to defendants Nos. 7 and 8 was valid, and found that it was wholly invalid for want of consent on the part of the plaintiff and her daughters, and as being in contravention of the terms of the award of the 21st September 1890; accordingly the sale was set aside, but the lower court's decree was confirmed only in so far as it set aside the sale,

* Review Petition No. 1 of 1893 of the Judgment in Appeal No. 18 of 1892, dated the 6th day of December 1892.

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and the suit was dismissed without prejudice to the plaintiff's rights under the award.

The finding and decree of this court seem to be open to the following objections. The plaintiff in seeking to set aside the sale sought by implication to have it set aside only so far as it affected her share of the property, and the lower court setting it aside could have done so only to that extent. By confirming the lower court's decree in that respect this court's decree has the effect of setting aside the sale only to the extent of the plaintiff's share, though this court in its finding intended to set aside the sale entirely, as being opposed to the legal operation of the award.

The sale cannot be set aside *in toto* in the present suit, for the plaintiff cannot be granted greater relief than she has asked for in the plaint nor more than what she would be entitled to in the suit as at present framed.

The suit having been dismissed on the ground that the plaintiff's rights under the Mahomedan Law were merged in the award of the 21st September 1890, what the rights under the award are is a question that would properly arise in a suit based on the award. If defendant No. 5 failed to pay to the plaintiff and her daughters the amount mentioned in the award within one month from its date, no doubt the bungalow would vest in them. But it is contended that they by their subsequent conduct prevented defendant No. 5 from acting up to the terms of the award, that he had good and lawful excuse for not tendering the amount within the period fixed by the arbitrators, and that he did not adduce

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all the evidence he had on the subject in the absence of a direct issue on the point. The award being contingent in its effect, the rights of the parties depend upon the fulfilment or otherwise of the conditions imposed by it. Whether there has been a breach of its conditions on the part of defendant No. 5 is a question that rests on evidence. The wording of the 2nd issue does not seem to indicate that it was meant to relate to what transpired subsequent to the date of the award.

In these circumstances the question as to what rights the plaintiff and her daughters acquired under the award, and whether the sale to defendants Nos. 7 and 8 is valid or not may well be left to be determined in a separate suit.

It is therefore ordered, in modification of the former judgment and decree, that the plaintiff's suit be dismissed without prejudice to her rights under the award of the 21st September 1890 and that each party do bear his or her own costs throughout.

Appeal allowed. Suit dismissed.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Resident.

1882 *April* 12.

BARMANA (PLAINTIFF) *v.* BASSAMA AND OTHERS (DEFENDANTS).*

Hindu law—Joint property—Indications of joint interest—Devolution of separate property.

Held, that residence with a brother under the circumstances appearing in the case, does not create in favour of the brother so residing a joint interest in property acquired by the brother with whom he resided.

The property, being the separate property of the brother acquiring them, devolved at his death on his son exclusively.

* Appeal No. 20 of 1891, against original decree No. 2297 of 1889 of Colonel W. Hill, Civil Judge of the Civil and Military Station of Bangalore, dated the 13th day of August 1891.

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The facts of the case appear sufficiently from the judgment of the appellate court.

Messrs. *Lawrance* and *C. Moorugasa Moodliar* for the appellant.

Mr. *A. Sambasivia* for respondents Nos. 1 and 4.

Mr. *Lubeck* for respondent No. 2.

Mr. *Evers* for respondent No. 3.

The Judgment of the officiating Resident (*Sir* H. N. D. PRENDERGAST) was as follows :—

This is a suit in *formâ pauperis* to set aside the sale of three houses and to recover possession of them and of some movables mentioned in the plaint schedule.

The facts of the case briefly stated are these :— One Karibasapa, a milkman, acquired three houses in the Civil and Military Station of Bangalore and died about fifteen years ago. His son Mariapa carried on the business and was possessed of some movables consisting of cattle &c., besides the houses. He conveyed two of the houses to Ramasamiapa, defendant No. 3, and the remaining house to his own sister Nanjama, defendant No. 2, by the sale-deeds *A* and *B*, dated 11th and 12th January 1888, for Rs. 600 and Rs. 200 respectively, and died about November 1888, leaving no male issue. The present suit is by his first cousin Barmana, to set aside the sales and to recover possession of the houses and movables on the alleged ground that his late father Nanjapa and the said Karibasapa were undivided brothers and that the houses were joint property; that these sales were colorable transactions, fraudulent and

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void as against him he being entitled to the property by right of survivorship. The movables are alleged to be in the possession of Mariapa's widow Bassama (defendant No. 1) and his sister's son Rudrapa (defendant No. 4).

Defendant No. 4 denied that he was in possession of any of the movables. Defendant No. 1 admitted she was in possession of household utensils and some ornaments which she alleged had been pawned with one Rungapa; but she and defendants Nos. 2 and 3 denied the plaintiff's right to succeed to the plaint-property or to question the validity of the sale of the three houses and contended that Karibasapa and Nanjapa were not undivided in interest, but lived separate and that the plaint-property was acquired by Karibasapa and his son by their individual exertions and that therefore the plaintiff had no right to it.

The issues framed in the suit were:—

I. Whether the plaintiff's father Nanjapa and defendant No. 1's father-in-law, Karibasapa, ever lived together as members of a united family or whether they lived separately and earned their livelihood separately?

II. Whether all or any of the properties were the joint or self-acquisition of Karibasapa or Nanjappa and the plaintiff and Mariapa?

III. Whether the alienations of immovable property made by the late Mariapa were legal and valid or colorable and fraudulent?

IV. What movable property belonging to the

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family is in possession of defendants Nos. 1 and 4 and what is its value?

V. Is the plaintiff estopped by his renting the house from defendant No. 3 or has the lease which was executed by him been fraudulently obtained?

VI. What is the value of the immovable property?

VII. To what relief, if any, is the plaintiff entitled?

The findings of the lower court on the first three issues are that the families were previously distinct, each living on its own income; that the property acquired by Karibasapa is his and descends to his immediate heirs; that his son, Mariapa, therefore had absolute right over it and that the alienations made by him in favor of defendants Nos. 2 and 3 are valid and cannot be disputed by the plaintiff, who has no interest therein. As these findings were sufficient for the disposal of the suit the lower court did not record any finding on the remaining issues and dismissed the suit with costs. This is a pauper appeal from that decree.

I fully concur with the findings of the District Judge. Nanjapa, Karibasapa, Mariapa, Madapa and Aralapa were five brothers who originally belonged to Nelamangala. Karibasapa came and settled at Bangalore forty years ago; Nanjapa followed him a few years later; Mariapa also appears to have come and lived separately at Bangalore.

The plaintiff and his witnesses state that Nanjapa and Karibasapa lived together and that after Nanjapa's death about twenty years ago the plaintiff and his mother continued to live with Karibasapa and

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afterwards with his son Mariapa. On the other hand the defendants' witnesses say that Nanjapa and Karibasapa lived separate and that the latter acquired the plaint-houses. Considering the evidence on both sides I think it is probable that the plaintiff being an orphan was brought up by Karibasapa and Mariapa in their house. He tended their cattle and milked their cows. He also for a time earned Rs. 5 or Rs. 6 a month which he handed over to Mariapa as he was fed and clothed by them. Residence with them under such circumstances does not create in his favor a joint interest in their property. It is not shown that he or his father contributed towards the purchase of the houses. If the brothers were joint in interest and lived together, the title deeds relating to the houses would probably have stood in Mariapa's name he being the elder of the two. The explanation that Karibasapa being a more active member of the family, the houses were acquired in his name is not satisfactory or credible.

Aralapa's son, who seems to have come at the plaintiff's request to give evidence, admits that there was a division among the brothers at Nelamangala and that Nanjapa and Karibasapa went away to Bangalore with only two she-buffaloes. It cannot be believed that the plaint-property was acquired by means of them.

Under these circumstances I cannot but concur in the findings of the lower court.

If the property in suit was the separate property of Karibasapa, then it devolved at his death on his son Mariapa exclusively and the plaintiff has no

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interest in it and no right to dispute the alienations, the validity of which need not therefore be considered. 1892. Barmaka v. Bassama.

The appeal is accordingly dismissed with costs and the appellant is directed to pay the court-fees payable on the plaint and the memorandum of appeal.

Appeal dismissed with costs.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Resident.

ASHA BI AND ANOTHER (DEFENDANTS) v. KOOLSUM BI (PLAINTIFF).* 1892 April 12.

Administration—Liability of administrator—Administrator de son tort—Agency.

The junior widow of a deceased Mahomedan authorised *A* his younger brother to collect debts and distribute them among the heirs and she also executed a release renouncing to *A* all her rights under Letters of Administration, which *A* subsequently obtained as her attorney. Neither she nor *A* took steps to recover some of the debts and *A*, in conjunction with *B*, received a sum of one thousand rupees belonging to the estate and failed to account for it.

Held, in a suit by the senior widow for dower and share of property, that *A* represented the estate and was not merely the agent of the junior widow: and as they failed to account for debts, not only the assets in their hands but they themselves were both personally liable. Also that *B* was personally liable to the extent of Rs. 1,000.

The facts of the case appear sufficiently from the judgment of the appellate court.

Mr. *Lawrance* for the appellants.

Mr. *Lubeck* for the respondent.

The Judgment of the officiating Resident (*Sir* H. N. D. Prendergast) was as follows:—

In this case the plaintiff and defendant No. 1 are

* Appeals Nos. 23 and 24 of 1891 against original decree No. 640 of 1890 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 14th day of August 1891.

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the senior and junior widows respectively of one Abdul Gani who died on or about 3rd April 1888. Defendant No. 2, who is the younger brother of the deceased, took out a certificate in the District Court of the Civil and Military Station of Bangalore, to collect the outstanding debts due to the estate of the deceased. He also obtained Letters of Administration under a power of attorney from defendant No. 1 in the Madras High Court for the same purpose.

The plaintiff brought this suit to recover Rs. 550, the amount of dower due to her by her husband, Rs.200, the value of her movables which were with her husband and for an account of the property of the deceased, in which she claims a one-eighth share. Defendants Nos. 1 and 2 admitted the plaintiff's claim to the dower and movables, but contended that the expenditure exceeded the collections made by them, in proof of which they filed their accounts. The plaintiff disputed the correctness of the accounts and the District Judge who doubted their correctness appointed a Commissioner to examine and report on the accounts. Neither party took objection to the Commissioner's report.

As Mahamed Ali, the brother of defendant No. 1 and a partner with the deceased in his contracts with the Commissariat Department, appeared to have intermeddled with the deceased's estate and to have collected some of the debts, he was added as supplemental defendant, No. 3.

The District Judge, basing his judgment on the Commissioner's report and the evidence in the case, gave a decree in the plaintiff's favor for the dower and the movables and Rs. 805 which he found to be

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her share in the estate of the deceased. Defendants Nos. 1 and 2 were ordered to pay the decree amount out of the assets of the deceased and were also held personally liable as they neglected to collect all the debts due to the deceased and failed to account satisfactorily for the sums collected by them. He also held that defendant No. 3 was answerable to the extent of at least Rs. 1,000, as he took that sum with defendant No. 2 from one Kundasamy and appropriated to himself the sale-proceeds of part of the partnership property.

The defendants have preferred two separate appeals from that decree. The grounds of the appeal of defendants Nos. 1 and 2 are that they are not personally liable, that defendant No. 2 being defendant No. 1's agent cannot be liable together with her, that certain evidence in connection with the Commissariat Department was not received by the lower court and that the judgment is opposed to the facts and circumstances of the case.

The grounds of defendant No. 3's appeal are nearly the same.

There is nothing on record to show that the lower court refused to receive any evidence tendered by the defendants.

Defendant No.2 took out the certificate in his own name. It is alleged that this was not recognized at Madras, Bangalore being foreign territory, and that he therefore took out Letters of Administration in the Madras High Court for and on behalf of defendant No. 1, under a power of attorney. But before letters were granted she executed the release deed,

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Ex. B, whereby she renounced all her rights under the Letters of Administration and authorized defendant No. 2 to collect the debts and distribute them among the heirs of the deceased. It is therefore clear that he represented the estate and was not a mere agent of defendant No. 1.

The District Judge was quite right in basing his judgment on the Commissioner's report, to which no objection was taken by either party, and the evidence shows that defendants Nos. 1 and 2 did not take steps to recover some of the debts. As they failed to account for debts, not only the assets in their hands but they themselves are personally liable to the plaintiff's claim.

Defendant No. 3 did receive a Rs. 1,000 Government Pro-note, the property of the deceased, from witness Kundasamy Moodliar. It is alleged that he purchased the note from Kundasamy with whom it had been deposited by the deceased. But this is not credible seeing that he was a partner with the deceased. He seems to have sold a jutka, a pony, and some bullocks which were partnership property. The District Judge was therefore right in holding him responsible to the extent of at least Rs. 1,000.

The decree of the lower court is therefore confirmed and the two appeals are dismissed with costs.

Appeals dismissed with costs.

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Before Colonel P. D. Henderson, C. S. I., Resident.

1892
July 9.

MAHOMED HUSAIN (DEFENDANT No. 1) *v.* ALIM BEE (PLAINTIFF).*

Partnership—Onus—Accounts—Exclusive of oral by documentary evidence.

The plaintiff claimed a share as partner in a business on an oral agreement. In his evidence he stated that the terms of the agreement were reduced to writing in the day-book and signed by the parties; but of this no mention was made in the plaint. It was urged on behalf of the defendant, *inter alia* that the day-book produced was not the real one, as it did not appear to be kept in the ordinary course of business and contained but a few entries.

Held, that if the terms of the agreement were reduced to writing in the day-book, as alleged, such written agreement was the final contract upon which the suit ought to be based. After asserting that the terms of the agreement had been reduced to writing it was not open to the plaintiff to adduce oral evidence of its contents until he had taken the necessary steps entitling him to adduce secondary evidence.

The trade extending over but a few months and being a cash business did not require regular and systematic accounts and it could not be said that the day-book produced was one cooked-up for the purpose of the suit.

The burden of proving by clear and unmistakeable evidence that he was a partner in the trade entitled to one-fourth profits lay on the plaintiff. He failed to discharge the burden, the evidence relied on in his favour being quite consistent with the hypothesis that he was only a sub-partner of his brother. His suit must therefore be dismissed.

Mr. *Lawrance* for the appellant.

Mr. *Lubeck* for the respondent.

The Judgment of the Resident (*Colonel* P. D. HENDERSON) was as follows :—

The suit is for an account of partnership dealings. The plaintiff's case is that in or about the month of February 1890 he and the defendants entered into a

* Appeal No. 3 of 1892 against original decree No. 1445 of 1890 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 4th day of April 1892.

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verbal agreement to purchase the mango crop for the year of a certain garden and divide the profits between them equally; that accordingly the said crop was purchased for Rs. 1485 and large profits were realized by the sale of the mangoes, but that defendant No. 1, who kept all the accounts relating to the transaction and all the monies belonging to the business, refused to render an account of the partnership and to pay to the plaintiff his one-fourth share of the profits. The plaintiff estimated his one-fourth share at Rs. 800.

Defendant No. 2, who is the plaintiff's own brother, fully supports his case. Defendant No. 1 denies that the plaintiff was ever a partner with him in the mango trade and pleads that defendants Nos. 2 and 3 were merely his servants, remunerated by a share in the profits, and that the plaintiff only acted in the interests of his brother, defendant No. 2, in the absence of the latter. Defendant No. 3, who is the brother of defendant No. 1, supports the cause of his brother.

The District Judge found that the plaintiff and defendants Nos. 2 and 3 were only servants under defendant No. 1 in the business, but were entitled to a share in the profits. He therefore held that the plaintiff is entitled to an account, but being of opinion that there was hardly any necessity for taking an account, he awarded to the plaintiff Rs. 623-4-0, which was the sum accepted by defendant No. 2 as his share of the profits, and which, therefore, the District Judge assumed to represent a fourth share of the profits.

From that decree defendant No. 1 has preferred

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this appeal. Objection to the lower court's finding has been taken by the respondent also, on whose behalf it is argued that the District Judge was wrong in finding that the plaintiff was not a partner but only a servant entitled to an account.

The questions for determination are, whether the plaintiff was a partner in the mango trade and, if not, whether he was entitled to a one-fourth share of the profits as a servant under defendant No. 1. The suit is based on a verbal agreement said to have been entered into between the parties in February 1890. It is admitted that none besides the parties were present at the time. In the witness box the plaintiff deposed that, after the purchase of the crop, the terms of the agreement were reduced to writing in defendant No. 1's day-book and signed by the parties. If so, the written agreement was the final contract upon which the suit ought to have been based; but it is strange that no mention of it is made in the plaint. After asserting that the terms of the agreement had been reduced to writing, it was not open to the plaintiff to adduce oral evidence of its contents until he had taken the necessary steps entitling him to adduce secondary evidence.

The plaintiff produced evidence to show that he had taken part in the mango trade and some of his witnesses stated that he was admitted by defendant No. 1 to be a partner. The District Judge gives good reasons for finding that the plaintiff was not a partner and I do not think that the evidence on record is sufficient to find that he was a servant entitled to a share in the profits. The fact of his having taken part in the trade is perfectly consist-

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ent with defendant No. 1's contention that he was taken to help his brother, defendant No. 2, who had been promised a share in the profits and was actually given his share. It is not at all likely that defendant No. 1, who had to borrow the capital on his own responsibility at a high rate of interest, bear all the risks of the trade and contribute his labor to boot, would consent to pay a one-fourth share to defendant No. 2, and another one-fourth to the plaintiff, while he himself was to get only a fourth.

The District Judge observes that defendant No. 1 has withheld the real day-book and that *Ex. II*, which has been produced as the day-book, does not look like one kept in the regular course of business and contains only a few entries of transactions. The mango trade extending over but a few months, and being a cash business does not, I think, require regular and systematic accounts, for the only transactions to be recorded were the number of mangoes sold each day and the amount of sale proceeds realized. As *Ex. II* contains defendant No. 2's receipt for the amount paid to him it cannot be said that it is a cooked-up day-book for the purpose of this suit.

The burden of proving by clear and unmistakable evidence that he was a partner in the trade entitled to one-fourth of the profits lies on the plaintiff. I think he has failed to discharge the burden, the evidence relied on in his favor being quite consistent with the hypothesis that he was only a sub-partner under his brother.

The District Judge's finding that the plaintiff is

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entitled to a one-fourth share of the profits is not supported by any reliable evidence. That Rs. 623-4-0, the sum received by defendant No. 2, represents a fourth part of the profits is only an inference.

After a careful consideration of the case I think the evidence is not sufficient to support the District Judge's decree, which is hereby reversed and the plaintiff's suit dismissed. The appellant's costs in this court as well as in the court below must be paid by the respondent who will bear her own costs.

Appeal allowed. Suit dismissed with costs.

CIVIL REVISION.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Resident.

1892 April 12.

ANDREWS AND ANOTHER (DEFENDANTS) v. ABDUL RAHMAN SAIB AND ANOTHER (PLAINTIFFS).*

Compensation under Land Acquisition Act—Jurisdiction of Provincial Small Cause Court.

Where there were contending claims to land taken up for public purposes and for which compensation had been awarded, *Held*, that a suit by one claimant against another for declaration of title to the land and of right to receive the compensation awarded, was not cognizable by a Court of Small Causes.

Mr. *J. W. Hayes, Jr.* for the petitioners.

The Order of the Officiating Resident (*General Sir* H. N. D. PRENDERGAST) was as follows :—

This is an application under s. 622 of the Code of Civil Procedure to set aside the order of the District Judge of the Civil and Military Station of Bangalore in Civil Miscellaneous Appeal No. 3 of 1891 on his file.

* Civil Revision No. 30 of 1891 against the order of Colonel W. Hill, Civil Judge of the Civil and Military Station of Bangalore, in Miscellaneous Appeal No. 3 of 1891, dated the 14th day of August 1891.

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Certain land was taken up by the Municipality under the Land Acquisition Act but the Municipality withheld payment of the compensation money as there were adverse claims to the land, and consequently to the compensation awarded, and referred the claimants to the civil courts for establishment of their right to receive the money. Accordingly the plaintiffs sued the defendants in the court of the Munsiff for a declaration of their title to the land and of their right to receive the compensation awarded by the Municipality.

The defendants contended that the suit was of a nature cognizable by the Small Cause Court. Their plea was accepted by the Munsiff who ordered the plaint to be returned to be presented to the Court of Small Causes.

The plaintiffs appealed to the Civil Judge, who held that the suit was not of a nature cognizable by the Court of Small Causes and directed the Munsiff to bring the case on his file and dispose of it according to the merits.

The defendants have brought this petition for revision and reversal of the Civil Judge's order on the ground that the suit is one cognizable by the Court of Small Causes, and that he is wrong in holding it to be not so cognizable.

The petitioners' advocate refers to the case of *Bapuji Raghunath* v. *Kuvarji Edulji Umrigar*(1) in support of their contention: but that case refers to a suit brought under Act XV of 1882, to recover *fazendári* rent from the holder of *fazendári* land and

(1) I. L. R., 15 Bom. 400.

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was brought in a form cognizable by a Court of Small Causes under the said Act. The defendants denied the plaintiff's title to the *fazendári* land. The Bombay High Court held that in determining whether the Court of Small Causes had jurisdiction or not, the court must look to the nature of the suit as brought by the plaintiff and not to the nature of the defence.

Even if that Act were in force here the decision of the Bombay High Court would not apply to the present case, as the present suit is not to recover money only but is also for a declaration of the plaintiff's right to the land, which would come under s. 19, cl. (*g*) of the Act.

The present case seems to fall under cl. 11, sch. II of the Provincial Small Cause Courts Act (IX of 1887) which is the Act in force here. By cl. 14 of the said schedule a suit to recover, from a person to whom compensation has been paid under the Land Acquisition Act 1870, the whole or any part of such compensation is excepted from the cognizance of a Court of Small Causes. The principle underlying that rule would apply to the present case.

Section 23 of Act IX of 1887 clearly lays down, that when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a court cannot fully determine, the court may, at any stage of the proceedings, return the plaint to be presented to a court having jurisdiction to determine the title. From this it is clear that the suit in question is not one cognizable by a Court of Small Causes.

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I therefore decline to interfere with the Civil Judge's order which seems to be correct and I dismiss this petition. The opposite party incurred no costs in this court.

Application rejected.

Before Colonel P. D. Henderson, C. S. I., Resident.

1892 May 11.

KRISHNASAMY NAIDU (DEFENDANT No. 1) v. NARASIMA CHETTY AND OTHERS (PLAINTIFFS).*

Limited Company—Winding up—Suit to recover assets.

Where bonds form part of the assets of a limited company in process of liquidation, *Held,* that no suit upon such bonds can be brought by individuals on their own private account.

Mr. *Lubeck* for the petitioner.

Mr. *Lawrance* for the counter-petitioners.

The Judgment of the Resident (*Colonel* P. D. HENDERSON) was as follows :—

This is an application for revision of the decision of the Civil Judge of the Civil and Military Station in Small Cause Suit No. 836 of 1891.

It is admitted by the advocate for the counter-petitioners that the bond sued on forms part of the assets of the Sri Nidhi Company, *Limited.* This being the case, the plaintiffs cannot bring a suit on their own private account, as has been previously held by this court(1). The petition to wind up the Company was filed prior to the institution of this suit. The decree of the lower court must therefore be set aside and the suit dismissed with costs. The petitioner's costs in this court to be paid by the counter-petitioners.

Application allowed. Suit dismissed.

* Civil Revision No. 33 of 1891 against original decree S. C. No. 836 of 1891 of Colonel W. Hill, Civil Judge of the Civil and Military Station of Bangalore, dated the 12th day of June 1891.

(1). Civil Revision Petitions Nos. 5, 6 and 7 of 1891.

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APPELLATE CRIMINAL.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Resident.

1892 *Feb.* 13.

QUEEN-EMPRESS *v.* MUNISAMY.*

Confession—Withdrawal—Corroboration—Evidence Act (I of 1872) ss. 25, 26, 27 and 80—Evidence of Magistrate who recorded confession—Code of Criminal Procedure (Act X of 1882) ss. 164, 364 and 309—Expression by Sessions Judge of opinion to assessors.

The accused was charged with murder of a child by drowning in a well where the body was found. He made a confession before a magistrate which he withdrew in the Committing Magistrate's Court and the Sessions Court. The evidence of the magistrate who recorded the confession was taken in the Sessions Court. It was objected on behalf of the prisoner that this evidence was wrongly admitted, that there was no corroboration of the statement and that the Sessions Judge had wrongly obtruded his opinion on the assessors.

Held, that, as the child's body and the well were discovered by independent means, the prisoner's subsequent admission to the police that he had thrown the child into the well was not admissible in evidence.

Also, that the confession would be admissible under *s.* 80 of the Evidence Act. If the provisions of *s.* 164 or *s.* 364 of the Code of Criminal Procedure were not fully complied with, the evidence of the recording magistrate to prove the circumstances under which the prisoner was brought to him and the confession recorded would be necessary. In the present case such evidence seemed redundant. The magistrate moreover was not examined as to the contents of the document. His evidence therefore seemed unobjectionable.

Also, that, as the prisoner withdrew his confession, it was necessary to see if there was reliable independent evidence to corrobo-

*Referred Trial No. 1 of 1892 and Criminal Appeal No. 1 of 1892 against the finding and sentence in Criminal Case No. 11 of 1892 of Major C. W. Ravenshaw, Sessions Judge of the Civil and Military Station of Bangalore, dated the 23rd day of January 1892.

(1) I. L. R. 10 Mad., 295.

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rate to a material extent and in material particulars the statements contained in the withdrawn confessional statement. The dictum of Kernan, J., in *Queen Empress* v. *Rangi* (1) followed. In the present case there being such corroboration, the conviction and sentence were upheld.

Also, that the expression of his opinion by a Sessions Judge to assessors does not vitiate the proceedings, as the judge is not bound to conform to the opinion of the assessors and the prisoner has the right of appeal on facts.

Mr. *J. W. Hayes* for the prisoner.

The *Government Prosecutor* (Mr. *J. C. S. Lawrance*) for the Crown.

The Judgment of the Officiating Resident (*Sir* H. N. D. PRENDERGAST) was as follows :—

Munisamy, the appellant, has been convicted by the Sessions Judge of the Civil and Military Station, Bangalore, of culpable homicide amounting to murder and sentenced to death.

Lingee, the first witness for the prosecution, was the prisoner's concubine for about eighteen months and bore him a male child about six months ago. On the 23rd December last, at about 5 P. M., she went with the child to the compound of his master, Mr. Lee, in whose service he was at the time as waterman, and applied to him for maintenance. He told her that he had no money but would pay her some in a day or two. She disbelieved his promise and came away, saying that she would teach him a lesson on the re-opening of the courts after Christmas. Papana, who was a gardener in the service of Mr. Lee, was present at this interview between the prisoner and Lingee, and corroborated the statement of Lingee.

At about 8-30 P. M. on that date Lingee put her child in the cradle, locked the door of her room and

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left the house to suckle the grand-child of Lakama, who had come to call her, telling Yellia, her next door neighbour, that she would return soon. After suckling Lakama's grand-child, Lingee returned home in about half an hour, when she found the lock of the door removed, the door open, the lamp in the room put out, and the child missing. She was informed by Yellia that the prisoner had come to the house during her absence and that he might have taken the child away. She went in search of the prisoner and found him in Papana's house at 9-30 or 9-45 p. m. and asked him if he had taken away the child; he then denied all knowledge of it. She thereupon took him to Yellia and confronted him with the latter. Yellia repeated what he had said to Lingee and told her that the prisoner must have taken away the child and advised her to report the matter to the police. Thereupon Lingee went to the Ulsoor Police Station accompanied by the prisoner and reported what had happened. Constable Subia went with them and another constable to Yellia and enquired what he knew about the matter. On being informed by Yellia that the prisoner had come to the house and taken away the child, Subia returned to the station, entered Lingee's complaint in the diary and arrested the prisoner at about midnight.

On the following morning at about 8 o'clock information was brought by Padmanabha, that something dark was floating in a well. On being questioned by Constable Kareem Khan, after this, the prisoner is said to have admitted that he had thrown the child into a well and pointed out the well. The body was taken out and identified by Lingee as that of her

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child. It was removed to the hospital where the Assistant Surgeon held a post-mortem examination.

On the evening of the 24th December the Second Magistrate recorded the prisoner's confessional statement, in which he admitted that on the previous evening Lingee had come to his master's house and pressed him for money, that on telling her he would pay her on the following day, she went away saying she had been fasting for twenty days and would serve him out; that at about 8 P. M. he went to her house, broke the lock, took the child, which was asleep in the cradle, and threw it into the well in Ulsoor Poodoo (New) Street at about 8-30 p. m. and that he did so as he was under the influence of liquor, having been treated to two drams of country arrack by his friend Papana at 8 p. m.

Before the committing magistrate the prisoner retracted his confession, admitting the interview between himself and Lingee at Mr. Lee's house on the evening of the 23rd December, but denying the truth of the rest of his confessional statement which he alleged he was forced to make by threats and beating by the police. Before the Sessions Court he stated that Police Constable Ali Khan gave him two kicks and compelled him to make a confession and took him to the well.

The above is a brief summary of the case. Before entering into a discussion of the evidence and its sufficiency for conviction I would consider the objection raised in appeal to the admission of certain evidence before the Sessions Court.

It is argued that the Sessions Judge has admitted in evidence statements properly within the rule of

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exclusion in regard to confessions made by a person in custody of the police.

Lingee stated "the accused took us, that is, the police, myself and the inspector, to the well in Ulsoor. The accused said 'the child is mine and I have thrown it in myself.'" As the prisoner was then in police custody his admission that he had thrown the child into the well is inadmissible under ss. 25 and 26 of the Evidence Act. Constable Kareem Khan's statement that the prisoner admitted having thrown the child into a well and pointed out the well, would be admissible under s. 27 of the Evidence Act and the ruling in *Queen-Empress* v. *Nana* (1), if the well and the body were discovered in consequence of the prisoner's statement; but from the Inquest Paper, which contains the constable's statement before the investigating officer and is admitted by him to be correct, it appears that on receiving information at 8 o'clock on the morning of the 24th December that the body of a child was in a well in New Street, he proceeded to the spot, had the body taken out, which was identified by Lingee as that of her missing child, returned to the station, informed the prisoner of the discovery of the child's body and asked him what he had to say, when he admitted having thrown the child in on the previous night and pointed out the well on being desired to do so. If the child's body and the well were discovered by independent means, the prisoner's subsequent admission to the police that he had thrown the child into the well would not be admissible in evidence.

(1) I. L. R. 14 Bom., 260.

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It is urged by the prisoner's counsel that the evidence of the Second Magistrate who recorded the confessional statement is inadmissible. The confessional statement is admissible under s. 80 of the Evidence Act. He was not examined with reference to the contents of that document but only as to the circumstances under which the prisoner was brought to him and the confession recorded. If, in recording the confession he had not fully complied with the provisions of s. 164 or s. 364 of the Code of Criminal Procedure, it would have been necessary to take evidence that the prisoner made the statement recorded. The Second Magistrate's evidence in this case seems to be redundant. As the prisoner in the courts of the Committing Magistrate and Sessions Judge withdrew his confession, it is necessary, after excluding from consideration the prisoner's inculpatory statements to the police, to examine the evidence on record and see " if there is reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements" (*per* Kernan, J., in *Queen-Empress* v. *Rangi*(1)).

The interview between Lingee and the prisoner on the evening of the 23rd December in Mr. Lee's compound was admitted by the prisoner before the committing magistrate and is proved by Lingee and Papana, who also swear that Lingee threatened to take judicial proceedings to recover maintenance from the prisoner.

Yellia, the only eye-witness who saw the prisoner

(1) I. L. R. 10 Mad., 295.

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leave Lingee's house during the brief period when she was absent at Lakama's, swears that he saw a child on the prisoner's shoulder at the time. This is said to be a variation from and an improvement upon what this witness had stated before the committing magistrate and the officer who held the inquest and to Lingee. The first person to whom Yellia communicated what he had seen is Lingee. At all stages of the proceedings in this case from the very commencement she made a uniform statement as to what Yellia had told her that the prisoner had come to her house and that he might have taken away the child. Yellia himself stated before the officer who conducted the inquest "why are you crying? Your husband Moonea came here just after you left; perhaps he has taken the child." He varied his statement slightly before the committing magistrate where he said, "I saw the accused coming from Lingee's house with something on his shoulder." Before the Sessions Court he made a similar statement at first but in cross-examination he distinctly said that the something on the shoulder was the child. This improvement in the statement may have been either intentional or the outcome of his belief that no one but the prisoner could have taken away the child as no one else, to his knowledge, came to the house during Lingee's short absence.

Except the prisoner's bare allegation that Yellia is on bad terms with him there is no evidence that such was the case.

It may be accepted beyond doubt that Yellia saw the prisoner leave the house, a fact which he communicated soon afterwards to Lingee, who in her

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turn repeated it to Papana, constable Subia, the investigating officer, the committing magistrate and the Sessions Court and it is corroborated by witnesses Papana and Subia and by her written complaint to the police.

Therefore the part of the prisoner's confessional statement in which he admits having gone to Lingee's house during her absence, receives corroboration from Yellia's evidence which is strengthened by the other evidence above referred to.

The fact of the door having been locked and the child left to sleep in the cradle is deposed to by Lingee and Lakama.

The prisoner admitted in his confessional statement that he was treated to two drams of liquor by Papana at 8 P. M. on the 23rd December. Papana, who was his friend and fellow-servant, admitted before the committing magistrate that he gave the accused one-and-a-half drams of arrack, and he repeated the statement before the Sessions Judge though he withdrew it in cross-examination and stated that he gave two-and-a-half annas to the prisoner but does not know if he (prisoner) spent it on liquor as he (Papana) left the shop soon after. Constable Subia states that the prisoner smelt of liquor. Papana also states that the prisoner smelt of liquor, though he was sober when he left with Lingee at 9-30 P. M.

The prisoner's confession is further corroborated by the circumstances and probabilities of the case. The body was discovered in a well and was identified by Lingee as that of her child. The medical

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evidence shows that death was due to asphyxia caused by drowning.

As the child was only six months old and as the well is at some distance from Lingee's quarters it must have been taken and thrown into the well by some one.

It is suggested for the first time in appeal, that Lingee herself may have done so either to revenge herself against the prisoner or to free herself from the trouble of maintaining the child. But such a hypothesis is unfounded and is negatived by Lingee's conduct. It is proved that the child was put into the cradle at about 8-30 p. m., when Lingee and Lakama left together for the house of the latter. After remaining at Lakama's for half an hour Lingee returned and noticed that the child was missing. It was during that short interval that the prisoner was seen leaving the house. Under these circumstances the natural and rational inference would be that the prisoner removed the child.

To strengthen the inference there is the prisoner's motive for the deed, as pointed out by the Sessions Judge. The prisoner may have thought that by doing away with the child he could avoid the unpleasantness of legal proceedings which Lingee threatened to take against him and rid himself of the burden of maintaining the child.

The above evidence, the circumstances and probabilities of the case and the prisoner's motive to commit the crime all tend to show that the withdrawn confessional statement is true. Alleged torture by the police is frequently pleaded by prisoners who withdraw their confessions. There is

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no evidence to show that any torture was inflicted or undue pressure brought to bear upon the prisoner.

It is alleged that the Sessions Judge was wrong in obtruding on the assessors his opinion of the evidence instead of merely summing up the evidence for the prosecution and defence as is required by s. 309, Code of Criminal Procedure. There is nothing on record to show that he did give any opinion. Even if he did so, that need not vitiate the proceedings, as he is not obliged to conform to the opinion of the assessors and the prisoner has the right of appeal on facts.

Another objection taken by the prisoner's counsel is that the Public Prosecutor was allowed to examine the accused. It would have been better to have employed a court interpreter, but the record shows that the Public Prosecutor merely interpreted the questions put by the court.

After a careful consideration of the case I concur with the finding and sentence of the Sessions Judge, which is confirmed and this appeal is rejected.

Appeal rejected. Sentence of death confirmed.

CRIMINAL REVISION.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Resident.

1892 Feby. 9.

YEJMAN KOTAY MAHOMED HOOSAIN SAIB (COMPLAINANT) v. P. PACHA SAIB AND OTHERS (ACCUSED).*

Code of Criminal Procedure (Act X of 1882), ss. 145 and 191—Complaint—Grounds for interference by magistrate to prevent breach of the peace—Civil dispute.

K alleged that *P* wrongfully attempted to take possession of shops attached to the Lubbay Mosque and was preventing the

* Criminal Revision No. 1 of 1892, against the order of Colonel H. M. S. Magrath, District Magistrate, Civil and Military Station of Bangalore, refusing to entertain an application under s. 145 of the Code of Criminal Procedure.

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collection of rents by *K*; that in consequence there was every likelihood of a breach of the peace between the two factions of the Lubbay community of which *K* and *P* were the respective heads; and therefore the magistrate was asked to interfere and confirm *K's* possession under *s.* 145 of the Code of Criminal Procedure. The magistrate refused to entertain *K's* application.

Held, that an application under *s.* 145 of the Code of Criminal Procedure is not a complaint under *s.* 191 and the magistrate is not bound to dispose of it as if it were. Such an application only apprehends the commission of an offence while a complaint discloses the actual commission of an offence.

Further, the magistrate should proceed under *s.* 145 of the Code of Criminal Procedure only when he is satisfied that a dispute likely to cause a breach of the peace exists. The suggested apprehension of a breach of the peace must not be merely colorable and made to induce the magistrate to deal with matters properly cognizable by the civil courts. There being no present danger of a breach of the peace, the fact that such a breach is likely to occur at a future time does not justify a magistrate in making an order as to possession.

The petitioner *K*, would have his remedy in the civil court, if the tenants, refuse to pay rent.

Mr. *J. Evers* for the petitioner.

The Order of the Officiating Resident (*General Sir* H. N. D. PRENDERGAST) was as follows :—

This is a petition for an order directing the District Magistrate of the Civil and Military Station of Bangalore to entertain, under s. 145 of the Code of Criminal Procedure, an application which it is alleged he refused to entertain on the ground that the matter is of a civil nature and to direct transfer of such application to the Second Magistrate for disposal.

It is alleged that a certain person who was occupying petitioner's shop as tenant and had paid rent previously, refused to pay the rent for January 1892, on the ground that he had been ordered by the counter-petitioner not to pay it to the petitioner, and that on account of the wrongful act of the former

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in attempting to take possession and to prevent the petitioner from collecting the rent, there is every likelihood of the occurrence of a breach of the peace between the two factions of the Lubbay community of the Civil and Military Station which are headed respectively by the petitioner and the counter-petitioner.

The petition to this court is supported by the petitioner's affidavit which sets forth that on the 16th January 1892 the District Magistrate refused to entertain the application, referring the petitioner to the civil courts, and that he declined to endorse his order on the application when it was again presented to him on the 18th of the same month, though requested to do so.

Petitioner's counsel argues that the District Magistrate was bound to take cognizance of the case under s. 191 and dispose of it in the manner provided by ss. 200—203 of the Code of Criminal Procedure and that he acted illegally in refusing to entertain the application. In support of his contention he referred to *In the matter of the Petition of Ganesh Narayan Sathe* (1) and *Baidya Nath Singh* v. *Muspratt* (2) as well as cases in Sutherland's Weekly Reporter.

The cases quoted refer to complaints; but an application to a magistrate to take action under s. 145 of the Code of Criminal Procedure is not a complaint as defined in that Code. The application involves the aid of a magistrate to prevent a breach of the peace by declaring possession, whereas a complaint is an "allegation made orally or in writing to a magistrate with a view to his taking action under the

(1) I. L. R. 13 Bom., 590. (2) I. L. R. 14 Cal., 141.

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Code, that some person, whether known or unknown, has committed an offence, but does not include the report of a Police Officer."

This application only apprehends the commission of an offence while a complaint discloses the actual commission of an offence. Therefore the magistrate was not bound to treat the application under s. 145 as a complaint under s. 191 and proceed to dispose of it in one of the ways pointed out by ss. 200—203 of the Code.

The next point to be considered is, whether the District Magistrate was bound under the circumstances of this case to proceed under s. 145. It is only when he is satisfied that a dispute likely to cause a breach of the peace exists that he should proceed under that section. The suggested apprehension of a breach of the peace must not be merely colourable and made to induce the magistrate to deal with matters properly cognizable by the civil courts. *Obhoy Chandra Mookerjee* v. *Mohamed Sabir* (1). There being no present danger of a breach of the peace, the fact that such a breach is likely to occur at a future time does not justify a magistrate in making an order as to possession. *Uma Churn Santra* v *Beni Madhub Roy* (2).

It is admitted that the shop in question is in the occupancy of a tenant. If he refuses to pay the rent the petitioner has his remedy in the civil court. The case does not call for the magistrate's action under s. 145 of the Code of Criminal Procedure. The petition is therefore rejected.

Application rejected.

(1) I. L. R. 10 Cal., 78. *S. C.* 13 C. L. R., 410.

(2) 7 C. L. R., 352.

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Before General Sir H. N. D. Prendergast, K. C. B., Officiating Resident.

1892 March 25.

HAJI MAHOMED YACOOB AND OTHERS (COMPLAINANTS) *v.* KOTAY MAHOMED HOOSSAIN AND OTHERS (ACCUSED).*

Code of Criminal Procedure (Act X of 1882) ss. 144 and 435—Proceedings—Revision.

Held, that the High Court has no power to interfere on revision with the order of a Magistrate under chapter XI (s. 144) of the Code of Criminal Procedure.

Mr. *J. Evers* for the petitioner.

The Order of the Officiating Resident (*Sir* H. N. D. PRENDERGAST) was as follows :—

This is an application under ss. 435 and 439 of the Code of Criminal Procedure to set aside an order directing the petitioners (accused) to abstain from interfering with the Mutwalis of the Lubbay Mosque in the appointment and removal of its servants and in its management and lighting generally until further orders.

The section of the Code of Criminal Procedure under which the order was passed is not quoted in the order but the only section under which such an order could be passed is s. 144. Section 435 (last para.) declares that orders under s. 144 are not proceedings within the meaning of that section, that is to say, they are not proceedings with reference to which a court can exercise powers of revision under ss. 435 and 439. The object evidently is to prevent the exercise of powers of revision by a superior court. This court cannot interfere.

The application is therefore rejected.

Application rejected.

*Criminal Revision No. 3 of 1892, against the order passed by Mr. Abdul Rahiman, Second Magistrate of the Civil and Military Station of Bangalore, in Criminal Case No. 32 of 1892, dated the 24th day of February 1892.

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Before Colonel P. D. Henderson, C. S. I., Resident.

P. VEERARAGHAVALU NAIDU (COMPLAINANT) *v.* NAWAB VIKAR-UL-MULK MUSTAK HUSSAIN (ACCUSED).*

1892 June 15.

Defamation—Jurisdiction—Extradition Treaty with the Nizam.

A resident (subject of the Nizam) at Hyderabad, Deccan, was charged on complaint before the Magistrate, Civil and Military Station of Bangalore, with defamation. *Held*, that as the offence of defamation is not one of those for which extradition can be demanded of the offender from the Nizam's Government under the Extradition Treaty of the 25th May 1867, it would be useless to proceed with the charge in Bangalore.

Mr. *D. Venketarangayya* for the petitioner.

The Order of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

The petitioner presented a complaint to the Second Magistrate of the Civil and Military Station of Bangalore charging one Nawab Vikar-ul-Mulk Mustak Hussain, a resident of Hyderabad (Deccan) with defamation, which was alleged to consist in sending a libellous letter to the Editor of the *Evening Mail* at Bangalore for publication. The Second Magistrate returned the complaint for presentation to some court in the Nizam's Dominions having jurisdiction to try the case, on the assumption that the parties and witnesses were all residents of Hyderabad.

The complainant makes an application for revision of the magistrate's order. It is urged on his behalf that the magistrate is wrong in assuming that the witnesses for the prosecution are residents of Hyderabad, they being as a matter of fact residents of Bangalore.

* Criminal Revision No. 6 of 1892 against the order passed by Mr. Abdul Rahiman, Second Magistrate of the Civil and Military Station of Bangalore, in Criminal Case No. 48 of 1892, dated the 12th day of April 1892.

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VEERARAGHAVALU NAIDU v. MUSTAK HUSSAIN.

Without entering into the arguments above summarized it is necessary first to see whether the accused person can be surrendered to a British court. The treaty which governs the surrender of offenders between the British Government and the Hyderabad State is the Extradition Treaty of the 25th May 1867. Art. 4 specifies certain offences for which surrender can be demanded and art. 5 provides that neither Government shall be bound to deliver up persons charged with offences other than those specified in art. 4. The offence of defamation is not one of those included in art. 4.

Under these circumstances there will be no use in proceeding with the case in Bangalore and the petition is therefore rejected.

Before Colonel H. P. Peacock, Officiating Resident.

1882 *July* 30.

SADASIVA CHETTY AND OTHERS (COMPLAINANTS) *v.* SOONDER DOSS BAVAJI (ACCUSED).*

Indian Companies Act—Notice to agent to produce books before Inspectors—Revision—Powers of criminal court to set aside acquittal.

The agent of a limited company was called on by the Directors to produce the account books of the company before Inspectors appointed by it. He pleaded that he had received no written notice until after the date fixed for production. *Held,* that the Act does not make the issue of a notice in writing necessary before the prosecution of an agent for refusing to produce the books; a verbal demand is sufficient.

Also, that although a court of criminal revision cannot convert a finding of acquittal into a conviction, it has power to revise and set aside an order of acquittal and direct a re-trial.

* Criminal Revision Petition No. 7 of 1892 against the order of acquittal passed in Criminal Appeal No. 22 of 1892, by Major C. W. Ravenshaw, Sessions Judge of the Civil and Military Station of Bangalore, dated the 20th day of May 1892, against the finding and sentence of the District Magistrate of the Civil and Military Station of Bangalore in Criminal Case No. 97 of 1892, dated the 10th day of May 1892.

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SADASIVA CHETTY v. SOONDER DOSS BAVAJI.

Mr. *Lawrance* for the petitioners.

Mr. *Evers* for the counter-petitioner.

The order of the Officiating Resident (*Colonel* H. P. PEACOCK) was as follows:—

This is an application, under ss. 435 and 439 of the Code of Criminal Procedure, to revise the order of acquittal passed by the Sessions Judge of the Civil and Military Station of Bangalore, in criminal appeal No. 22 of 1892 on his file.

The accused was the agent of a Company known as the "Jagan Mohini Nidi, *Limited*," and he was convicted by the District Magistrate of the Civil and Military Station of Bangalore, under ss. 84 and 86 of the Indian Companies Act (VI of 1882), for refusing to produce the account books of the Company before the Inspectors appointed by it for their inspection and was fined Rs. 51.

On appeal the Sessions Judge acquitted the accused on the grounds:—(i) that he was ignorant of the appointment of the Inspectors and of the authority on which he was called upon to produce the books and (ii) that there is nothing to show that he had received the notice calling on him to produce the books on the 6th April, before the 11th idem, on which date he admits having received it.

The appointment of Inspectors is contained in a special resolution of the Company, dated the 7th February and confirmed at a subsequent meeting of the shareholders on the 28th of the same month. These inspectors were witnesses for the prosecution. When the President and Directors of the Company sought by petition on the 5th March to have the resolution recorded, under s. 79 of the Companies

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Act, in the office of the Registrar of Joint Stock Companies, the accused was furnished with a copy of the resolution and was given notice of the application, which he actually opposed. The Registrar over-ruled the objection and the resolution was recorded on the 1st April. In the face of these facts it is difficult to believe that the accused was ignorant of the appointment of Inspectors. The Inspectors by their notice of the 2nd April called on the accused to produce the books on the 6th idem. Accused pleads that this notice did not reach him till the 11th of the month: granting this however to be the fact, it does not alter the case, for the Act does not make the issue of a notice in writing necessary before the prosecution of an agent for refusing to produce the books. A verbal demand seems to be as good as a notice in writing. The Inspectors swear that on the 6th April they called on the accused personally to produce the books and that he refused to do so. It is immaterial therefore whether the written notice reached him or not. The acquittal is based on wrong data, owing to a misconception of facts.

It is argued that this court as a court of revision cannot interfere with an order of acquittal, but no authority is quoted in support of this argument. As a court of revision it cannot convert a finding of acquittal into one of conviction but it has power to revise an order of acquittal and direct a re-trial. *Queen-Empress* v. *Balawant*(1).

The Sessions Judge's order of acquittal is therefore set aside and he is directed to re-try the appeal.

Acquittal set aside. Appeal to be re-heard.

(1) I. L. R. 9 All., 134.

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COORG CASES.

APPELLATE CIVIL.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Judicial Commissioner.

SYED SALAR (DEFENDANT No. 1) *v.* BHADUR JAMAL KHAN KHAISGY (PLAINTIFF).* 1891 *November 7.*

Suit by a Mahomedan for share in family property—Limitation Act (XV of 1877), Sch. II, Arts. 123, 127, 141 and 144.

A Mahomedan sued his uncles for a share in property the right to which he alleged had descended to him, through his mother (their sister) on the death of their father.

Held (on review), that Art. 123 of Sch. II of the Limitation Act is applicable to the case. The plaintiff claimed through his mother whose right to a share accrued on the death of her father. As this event admittedly occurred more than twelve years before the institution of the suit, the plaintiff's claim was barred by limitation.

The words "joint family property" in Sch. II, Art. 141 of the Limitation Act mean the property of a joint Hindu family; and the Article does not apply to families governed by Mahomedan Law. *Amme Raham* v. *Zia Ahmad*(1) and *Patcha* v. *Mohidin*(2) followed.

Mr. *Lawrance* for the appellant.

Mr. *Lubeck* for the respondent.

The Judgment of the Officiating Judicial Commissioner (*Sir* H. N. D. PRENDERGAST) was as follows :—

The facts of this case are detailed in the judgments of the lower courts.

The question for determination in this appeal is whether the plaintiff's suit is barred by the law of Limitation.

* Appeal from appellate decree No. 11 of 1891 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg in appeal No. 10 of 1891, dated 13th day of May 1891 reversing the decree of Mr. Gopala Row, Munsiff of Virajendrapet, in O. S. No. 232 of 1890, dated the 8th day of December 1890.

(1) I. L. R. 13 All., 282. (2) I. L. R. 15 Mad., 57.

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I concur with the learned District Judge in the opinion that *Ex. VI* is not evidence of a complete division of the ancestral property securing to the plaintiff's mother her share in it and both the lower courts hold that the defendants failed to prove their specific allegation that the plaintiff's mother had already received at her marriage the value of her share in money.

As to the plea of adverse possession the District Judge has correctly found that the defendant's possession was not adverse, as the plaintiff's mother and the plaintiff himself were maintained by Aminadeen, defendant No. 1's father, and the plaintiff could not have been excluded from his share until 1887. Under these circumstances Arts. 127 or 144 of the Limitation Act, Sch. II, applies to the case and the plaintiff's claim is not time barred. I am supported in this view by *Hashmat Begam* v. *Mazhar Husain* (1) and *Azam Bhuyan* v. *Faizudin Ahamed* (2).

For these reasons I confirm the decree of the lower appellate court and dismiss this appeal with costs.

Appeal dismissed with costs.

1892 *June* 18.

The appellant applied for a review of the above Judgment, which was admitted.*

Messrs. *Lawrance* and *Evers* for the appellant.

Mr. *Lubeck* for the respondent.

The Judgment of the Judicial Commissioner (*Colonel* P. D. HENDERSON) on review was as follows :—

Review of the former judgment and decree of the

(1) I. L. R. 10 All., 343. (2) I. L. R. 12 Cal., 594.

*Review Petition No. 1 of 1892.

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7th November 1891 was granted on the appellant's application in Civil Review Petition No. 1 of 1892 with a view to reconsider the point of limitation raised in this case.

1892 SYED SALAR v. BHADUR JAMALKHAN.

The lower appellate court held on the authority of *Bavasha* v. *Masumsha* (1), that Art. 127 of the Limitation Act (XV of 1877), applies to a suit by a Mahomedan for partition of joint family property and that therefore the present suit was not barred by limitation.

This view was upheld in the former judgment of this court. The question was recently discussed by the Allahabad and Madras High Courts in *Amme Raham* v. *Zia Ahmad* (2) and *Patcha* v. *Mohidin* (3), respectively. The Bombay case above referred to was also brought to their notice but they dissented from the ruling contained in it, and held that Art. 127 does not apply to families governed by the Mahomedan law, the words "joint family property" in that Article meaning the property of a joint Hindu family. The reasons given by the two High Courts for coming to that conclusion are to my mind sound and the view they have taken commends itself to me.

The next point for determination is which other Article of the Limitation Act is applicable to the present suit. Article 141 refers to a suit by a Hindu or Mahomedan remainderman or reversioner who is entitled to possession on the death of a Hindu or Mahomedan female; and Art. 144 applies to suits for possession of immovable property or any interest therein not otherwise specially provided for in the Act. The

(1) I. L. R. 14 Bom., 70. (2) I. L. R. 13 All., 282.
(3) I. L. R. 15 Mad., 57.

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plaintiff in the present case is not a remainderman or reversioner, for he claims through his mother who had an absolute interest in a definite share of the plaint property, and Art. 144 applies only where there is no other Article specially applicable. *Muhammud Amanulla Khan* v. *Badan Singh* (1).

I think Art. 123 is the one applicable to the case. In this view I am supported by the decision of the Madras High Court in *Kasmi* v. *Ayishamma* (2). The plaintiff claims through his mother whose right to a share accrued on the death of her father; which event admittedly occurred more than 12 years before the institution of this suit. The case of *Patcha* v. *Mohidin*(3) is in point and is stronger than the present case, as the family therein referred to lived to all intents and purposes like a joint undivided Hindu family under a common manager.

I therefore hold that the plaintiff's suit is barred by limitation. The former judgment and decree of the 7th November 1891 are hereby cancelled and the lower appellate court's decree is reversed and the plaintiff's suit dismissed.

In the circumstances of the case I direct that each party do bear his costs throughout.

Appeal allowed. Suit dismissed.

(1) I. L. R. 17 Cal., 137. (2) I. L. R. 15 Mad., 60.
(3) I. L. R. 15 Mad., 57.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Judicial Commissioner.

PACHUDA BIDIA (DEFENDANT) *v.* B. KRISHNIA (PLAINTIFF).*

1892 *March* 19.

Mortgage—Covenant for quiet enjoyment—Possession—Transfer of Property Act (IV of 1882), ss. 67 (d) and 68 (c)—Parties.

A mortgaged immoveable property to *B* and *C* with a proviso that they should have possession for twenty years, taking the produce towards interest and principal. *A* also covenanted that if their possession was disturbed he would be answerable for any loss.

At the time of the mortgage the property was in the possession of third parties whom *A* sued for possession. He compromised the suit allowing them to retain possession on certain terms as mortgagees.

Subsequently *C* assigned his right to recover one half of the mortgage-debt to *K*, who sued *A*, *B* and *C* for such half and interest.

Held, that, there being a covenant in the mortgage deed whereby the mortgagor was made liable to the mortgagees for any loss they might suffer by reason of any obstruction or resistance to their possession or enjoyment by him or his heirs or by strangers, the mortgagor was liable to make good the amount of the mortgage money to the mortgagees, that being the loss they suffered by reason of not being put in possession and the mortgagor having admitted the title of a third party whom he allowed to remain in possession: and even in the absence of such a covenant, the mortgagees were entitled under s. 68 (*c*) of the Transfer of Property Act (IV of 1882) to recover the mortgage money.

Also, that, whether as a co-mortgagor or as a co-creditor, *C* was competent under the Transfer of Property Act to transfer his rights under the mortgage to *K*, the plaintiff. Section 67 (*d*) of the Transfer of Property Act does not bar the suit, because that provision applies to suits for foreclosure or sale but not to suits for the recovery of the mortgage money, and in the present suit no relief is claimed against the mortgaged property.

As *B* refused to join with *K* in suing for the mortgage-debt and

* Appeal from appellate decree No. 12 of 1891 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg in apppeal No. 21 of 1891, dated 22nd June 1891, affirming the decree of Mr. M. Gopalarow, Munsiff of Virajpett in O. S. No. 643 of 1890, dated the 22nd day of June 1890.

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denied his right *in toto*, *K* was justified in suing alone for his share of the money and *B* and *C* were rightly made defendants in the suit.

The facts sufficiently appear in the judgment of the appellate court.

Mr. *Evers* for the appellant.

Mr. *Narasimha Iyengar* for the respondent.

The Order of the Officiating Judicial Commissioner (*Sir* H. N. D. PRENDERGAST) was as follows :—

Pachuda Bidia, defendant No. 1 in this case, mortgaged a coffee garden to defendants Nos. 2 and 3 for Rs. 800 by deed *Ex. III*, dated 17th November 1889, which authorized the mortgagees to retain possession of the garden and enjoy its produce in lieu of interest and in payment of the mortgage money for a period of 20 years and contained a stipulation to the effect that, in the event of any disturbance to the mortgagees' possession and enjoyment by either the mortgagor or his heirs or by strangers, he should settle it and be answerable to the mortgagees for any loss they might sustain by reason of the disturbance.

In 1890 he brought O. S. No. 2 of 1890, in the Court of the Second Assistant Commissioner of Coorg against Palingada Subia, Tyana, Apaia, Manja and Paramashevaraya to recover possession of the garden, but that suit was compromised and a decree was passed in terms of the compromise on the 17th March 1890. From the petition of compromise it appears that the said Palingada Subia and his ancestors had opened the garden on land belonging to defendant No. 1 and undertook to pay Rs. 1,000 due to Paramashevaraya by the said Palingada Subia; but as he had no ready money it was arranged that Paramasheva-

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raya should pay Rs. 450 to defendant No. 1 and remain in possession of the garden, for a term of twenty-nine years, as mortgagee in consideration of Rs. 1,450 thus made up. Defendant No. 3 transferred his rights and interest under *Ex. III*, *i. e.*, his right to recover a moiety of the mortgage-debt, to Krishnia, the plaintiff, by deed of assignment *Ex. A*, dated 28th June 1890, and the latter brought this suit to recover Rs. 484, being half the mortgage money and interest. Defendant No. 2 was added as defendant because he is said to have declined either to join with the plaintiff in suing for the mortgage money or to transfer his rights under *Ex. III* to the plaintiff. The defendant's contention before the lower courts was that the mortgage money on *Ex. III* proceeded wholly from defendant No.2, defendant No. 3 being only a nominal party to the mortgage, that the deed of assignment *Ex. A* to the plaintiff was not supported by consideration, and that therefore the plaintiff's suit was not maintainable. But both the lower courts held that half the mortgage money had been paid by defendant No. 3 and that there was consideration for the assignment in the plaintiff's favor and decreed according to the plaint against defendant No. 1, who now prefers this second appeal.

The points raised for determination are :—

I. Was defendant No. 1 in possession of the garden and did he make it over to defendants Nos. 2 and 3 at the time when he executed *Ex. III* in their favor ?

II. If not, is he liable under the terms of that

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document or under the Transfer of Property Act to re-pay the mortgage money?

III. Is defendant No. 3 competent to transfer his rights under the mortgage to the plaintiff irrespective and independently of the defendant No. 2?

IV. Can the plaintiff sue for a moiety of the mortgage money independently of defendant No. 2?

On the first point there is a distinct averment in the plaint that defendant No. 1 was not in possession and had failed to put the mortgagees in possession of the garden. This is not distinctly denied by defendant No. 1 in his written statement. In the petition *Ex. C*, to which he was a party, he admitted that the garden had been opened by, and had been in possession of Palingada Subia and his family and consented to pay them Rs. 1,000 in consideration of their renouncing their rights in the garden, and to allow Paramashevaraya to remain in possession as mortgagee for a term of twenty-nine years on his agreeing to advance Rs. 450 in addition to the Rs.1,000 due to him by Subia and others which the plaintiff undertook to pay. *Ex. A* contains a distinct admission on the part of defendant No. 3 that the garden was not in the possession of defendant No. 1 at the time of the mortgage and that he failed to put the mortgagees in possession.

Thus it is clear that defendant No. 1 was not in possession at the time of the mortgage to defendants Nos. 2 and 3 or subsequently.

As regards the second point, there is a covenant in the mortgage deed that the mortgagor is liable to the mortgagees for any loss they might suffer by

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reason of any obstruction or resistance to their possession or enjoyment by him or his heirs, or by strangers. If the mortgagees were not put in possession and the mortgagor admitted the title of a third party whom he allowed to remain in possession, then the loss which the mortgagees have suffered is the loss of the mortgage money.

Even in the absence of such a covenant the mortgagees are entitled under s. 68 (*c*) of the Transfer of Property Act to recover the mortgage money, as the mortgagor failed to deliver the garden or to secure the possession thereof to them without disturbance by any person. *Mahesh Singh and others* v. *Chanharja Singh* (1). Thus under the provisions of the mortgage and of the Act the mortgagees are in this case entitled to recover the mortgage money. The cases in *Fakir Baksh* v. *Sadat Ali* (2) and *Chathu* v. *Kunjan*(3), cited by the appellant's advocate, refer to usufructuary mortgagees in possession suing for foreclosure or sale of the mortgaged property and are therefore not applicable to the present case.

Whether as a co-mortgagor or as a co-creditor, defendant No. 3 was competent under the Transfer of Property Act to transfer his rights under the mortgage to the plaintiff.

The lower courts have found on the evidence that defendant No. 3's interest under the mortgage extended to a moiety of the mortgage amount and I see no reason to differ from them.

This is a matter which affects the interests of de-

(1) I. L. R. 4 All., 245. (2) I. L. R. 7 All., 376.
(3) I. L. R. 12 Mad., 109.

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fendant No. 2, who has not appealed, more than those of the defendant No. 1.

As defendant No. 2 refused to join with the plaintiff in suing for the mortgage debt and denied his right *in toto*, the plaintiff was justified in suing alone for his share of the money and defendants 2 and 3 were rightly made defendants in the suit.

The appellant's advocate contends that the suit is not maintainable under s. 67 (*d*) of the Transfer of Property Act (IV of 1882), but that provision applies to suits for foreclosure or sale and not to suits for the recovery of the mortgage money. In this suit no relief is claimed against the mortgaged property, therefore the objection cannot stand.

Appeal dismissed with costs.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Judicial Commissioner.

1892 *March* 25.

SANTHE GOWDA (PLAINTIFF) *v.* VEERABHADRA GOWDA (DEFENDANT).*

Second appeal by successful party not objecting in regular appeal.

A plaintiff, respondent in the lower appellate court, did not appeal in that court nor make any objection to the decree when appealed against by the defendant. The lower appellate court confirmed the original decree.

Held, that it was not open to the plaintiff to prefer a second appeal upon a point regarding which he did not appeal nor raise any objection in the District Court.

* Appeal from appellate decree No. 13 of 1891 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg in appeal No. 25 of 1891, dated the 3rd day of August 1891, affirming the decree of Mr. A. Ramya Punja, Munsiff of Mercara, in O. S. No. 299 of 1890, dated the 27th day of May 1890.

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SANTHE GOWDA v. VEERABHADRA GOWDA.

Mr. *J. W. Hayes, Jr.* for the appellant.

Mr. *Lawrance* for the respondent.

The Judgment of the Officiating Judicial Commissioner (*Sir* H. N. D. PRENDERGAST) was as follows:—

The plaintiff sued the defendant, his elder brother, for partition of the family movable and immovable property. The defendant pleaded that the plaintiff had already obtained his share of the movables and that three of the plaint-lands were his (defendant's) self-acquisition. The Munsiff of Mercara gave a decree for half the lands and for half the value of the movables which were found in the defendant's possession when an inventory of them was made, soon after the institution of the suit, by order of the Munsiff.

From that decree the defendant appealed, but the plaintiff did not appeal. The latter did not object to any part of the decree while it was under appeal. The District Judge of Coorg confirmed the Munsiff's decree.

The plaintiff prefers this second appeal on the sole ground that half of the moveables should have been decreed to him instead of their value. He did not appeal to the District Court against that part of the decree, nor did he take objection to it under s. 561 of the Code of Civil Procedure while the appeal was pending. It is not open to him under the circumstances to prefer a second appeal on that point.

This appeal is therefore dismissed with costs.

Appeal dismissed with costs.

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June 11.

Before Colonel P. D. Henderson, C. S. I., Judicial Commissioner.

YACOOB SAIB AND ANOTHER (DEFENDANTS) v. HAMIDABEE AND OTHERS (PLAINTIFFS).*

Mahomedan Law—Commensality—Separate property—Presumptions—Shares of the widow and daughters of a deceased Mahomedan in his estate.

The widow and daughters of a deceased Mahomedan sued his two brothers to recover immovable property alleged to be part of his separate estate. The brothers contended it was the common property of themselves and the deceased.

Held, that the burden of proving that the lands in suit are the common property of the deceased and themselves lay on the defendants. Even granting that they lived in commensality they did not form a joint family in the sense in which that expression is used with regard to Hindus, and there is no presumption in Mahomedan, as there is in Hindu law, that the acquisition of the several members are made for the benefit of the family jointly. The rules and presumptions which are applicable to a joint Hindu family cannot be applied to a Mahomedan family living jointly, unless they have adopted the Hindu law of property. The Mahomedan law presumes that each share is separate and that each sharer is the separate owner of his share. If such sharers wish to live together they may do so, but their separate ownership and relations are not changed. The defendants have failed to prove that the land was purchased with family funds or that they participated in its profits.

The widow and daughters are not entitled to the whole of the deceased's property. Under the Mahomedan law they are entitled only to one-eighth and two-thirds respectively. The deceased's daughter who survived her father, was entitled to one-third of the daughters' two-third share. As her representatives have not joined in the suit the other two daughters cannot recover more than their shares, *viz.*, two-ninths each or four-ninths in all, and the widow a one-eighth share.

The facts of the case appear from the judgment of the appellate court.

* Appeal from appellate decree No. 15 of 1891 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg in appeal No. 83 of 1891, dated 25th June 1891, reversing the decree of Mr. M. Gopala Row, Munsiff of Virajpett in O. S. No. 718 of 1890, dated the 21st day of May 1892.

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YACOOB SAIB *v.* HAMIDABEE.

Mr. *Srinivasa Iyengar* for the appellant.

Mr. *Lawrance* for the respondent.

The Judgment of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows :—

This is a suit by the widow and two daughters of one Ismail Saib, who died in 1888, to recover possession of two plots of wet land from his brothers, the defendants, who are said to have taken possession of the land on his death.

The plaintiffs' allegation is that the land of 150 *batties* was purchased by the deceased in 1866 under *Ex. A* and that the land of $148\frac{3}{4}$ *batties* was made over to him by his father in about 1865 on condition of his discharging the father's debts of Rs. 650. Both lands were entered in his name in the jamabandi register and were in his possession up to the time of his death.

The defendants contended that both lands are the common property of the three brothers. They allege that they jointly discharged their father's debts and that the land of $148\frac{3}{4}$ *batties* was transferred to the name of Ismail Saib as he was the eldest of the three brothers and that the other land was purchased in his name with family funds at a time when they lived together under his management.

The Munsiff, being of opinion that there was no satisfactory evidence of division among the three brothers, held that the family and the property must be presumed to be joint and that the plaintiffs are entitled only to $70\frac{3}{4}$ *batties*, being their shares in Ismail Saib's one-third share in the lands, and he gave a decree accordingly.

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On appeal by the plaintiff, the District Judge did not concur in the Munsiff's view and held that the plaint-lands were the separate property of the deceased Ismail Saib and that the two daughters are entitled to two-thirds and the widow to one-eighth. Accordingly, he modified the Munsiff's decision and decreed to the plaintiffs 236½ *batties* out of the plaint-lands.

The defendants prefer this second appeal. The chief points for determination are (1) whether the plaint-lands are the common property of the defendants and Ismail Saib or the separate property of the latter, and (2) what is the plaintiffs' share in them.

As regards the first point I fully concur with the District Judge in his finding that the lands in dispute are the separate property of Ismail Saib. The evidence for the plaintiffs, which is supported by the witnesses for the defendants, shows that Ismail Saib lived in his wife's house from the time of his marriage, which took place 25 or 30 years ago, while the defendants lived apart in a portion of the family house which had fallen to their share and subsequently shifted elsewhere. Ismail Saib had separate dealings and the defendants also traded on their own account and acquired property for themselves. The portions of the family house allotted to the latter stood in their names in the jamabandi register and defendant No. 1's portion was sold in execution of a decree and purchased by the decree-holder, who subsequently transferred it to defendant No. 2.

The family debt of Rs. 650 or so appears to have been discharged by Ismail Saib by mortgaging his

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wife's house. It is very probable that the family land was made over to him on his undertaking to discharge the debt; otherwise it is difficult to account for the transfer of the land to his name in the Revenue Register during the absence of his father. It is suggested by the defendants' advocate that the father may have done so with the object of making a provision for all the three sons, when he took to himself a second wife. But there is nothing on the record to show when the father's second marriage took place, nor was this argument advanced in the lower courts. If such had been the case it is not likely that the defendants would allow Ismail Saib to enjoy the land until his death without claiming their shares in it, especially when they were involved in debt. Moreover they were grown up men, one of them being now admittedly 45 years of age.

The burden of proving that the lands in suit are the common property of themselves and Ismail Saib devolves upon the defendants. Even granting that they lived in commensality, which is not the case according to the evidence in the present suit, they did not form a joint family in the sense in which that expression is used with regard to Hindus, and there is no presumption in Mahomedan, as there is in Hindu law, that the acquisition of the several members are made for the benefit of the family jointly. See *Hakim Khan* v. *Gool Khan and others*(1). The rules and presumptions which are applicable to a joint Hindu family cannot be applied to a Mahomedan family living jointly unless they have adopted

(1) I. L. R. 8 Cal., 826 and 833 (*n*).

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the Hindu law of property. *Luchmon Sahai Chowdhry and another* v. *Kanchun Ojhain and others*(1). The Mahomedan law presumes that each share is separate and that each sharer is the separate owner of his share. If such sharers wish to live together, they may do so but their separate ownership and relations are not changed (*Per* Mahmood, J., in *Amme Baham and others* v. *Zia Ahmad and others*(2) and *Kasmi and others* v. *Ayishamma and others*(3).

The defendants have failed to prove that the land purchased by Ismail Saib under *Ex. A* was purchased with family funds, or that they participated in its profits. The purchase appears to have been made for Rs. 40, which was not so large a sum as to presume the defendants' assistance by way of contribution.

As regards the second point, it seems to me that the lower courts are wrong in calculating the plaintiffs' shares. It appears from the Munsiff's judgment that Ismail Saib left a third daughter, besides plaintiffs Nos. 1 and 2, who is dead and whose children are not parties to the suit. He is mistaken in thinking that the widow and the daughters are entitled to the whole of Ismail Saib's property or share. Under the Mahomedan Law they are entitled only to one-eighth and two-thirds respectively. The learned Judge has overlooked the fact that the deceased daughter, who appears to have survived Ismail Saib, was entitled to one-third of the two-thirds share of the daughters. As her representatives have not joined in the suit, plaintiffs Nos.

(1) I. L. R. 10 Cal., 525.

(2) I. L. R. 13 All., 282. (3) I. L. R. 15 Mad., 60.

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1 and 2 cannot recover more than their shares, *viz.*, four-ninths. Each of the plaintiffs Nos. 1 and 2 is entitled to two-ninths each out of the plaint lands and plaintiff No. 3 is entitled to a one-eighth share. 1892 YACOOB SAIB *v.* HAMIDABEE.

The decree of the Lower Appellate Court is modified accordingly. In other respects it is confirmed. Each party should bear his or her own costs of this second appeal.

Decree modified. No costs.

Before Colonel P. D. Henderson, C. S. I., Judicial Commissioner.

RAMASETTY MALLSETTY AND OTHERS (DEFENDANTS) *v.* PUTTASETTY PUTTAPPASETTY AND OTHERS (PLAINTIFFS).* 1892 *July* 2.

Code of Civil Procedure (Act X of 1882), ss. 30, 539, 34—Objection advanced for first time in second appeal—Scope and object of s. 30 of the Code of Civil Procedure—Right of President and committee appointed by community to sue without joining all members of the community.

An objection under *s.* 539 or *s.* 30 of the Code of Civil Procedure is too late when advanced for the first time in second appeal.

An objection under *s.* 30 of the Code that there are others who have the same interest in the suit as the plaintiffs and that such persons have neither been added as plaintiffs nor represented by the plaintiffs on record with the leave of the court is an objection for want of parties and must be made before the first hearing.

Section 30 of the Code of Civil Procedure is merely regulative and not constitutive. It indicates the procedure to be followed when it is intended to make the decision in a suit binding also on those who are not parties but have the same interest in it as the parties have. If such other persons are not represented with the leave of the court and in the manner prescribed by *s.* 30 then it must be seen whether the plaintiffs in themselves are entitled to the relief they ask for. *Anandrav Bhikaji Phadka* v. *Shankar Daji Charya*(1) approved.

* Appeal from appellate decree No. 7 of 1892 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg in appeal No. 47 of 1891, dated 31st December 1891, reversing the decree of Mr. Brooke Leggatt, Assistant Commissioner of Coorg, in O. S. No. 1 of 1888, dated the 31st August 1891.

(1) I. L. R. 7 Bom., 324.

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RAMASETTY MALLSETTY v. PUTTASETTY PUTTAPPASETTY.

The plaintiffs were the president and members of a committee appointed by the Devanga community with the sanction of the spiritual head, the Śwami of the Ramachendrapur Mutt, for the purpose of settling all caste disputes and managing the affairs of the temple; and they sued for possession of the temple, which they alleged to belong to the community as a whole. *Held*, that the whole community could not manage the temple except through its representatives, the plaintiffs, who were therefore competent to sue for possession without joining with them all the members of the community whom they represent, as plaintiffs.

Mr. *Lawrance* for the appellants.

Mr. *M. V. Krishna Rao* for the respondents.

The Jŭdgment of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

The facts of the case are fully stated in the judgments of the lower courts. The important points raised for consideration in this second appeal are:—

(1). Whether the plaintiffs' suit is not maintainable by reason of their not having obtained the permission of the Advocate-General or of the Collector for its institution under s. 539 of the Code of Civil Procedure and also for their failure to obtain the leave of the court under s. 30 of the Code to sue on behalf of the Devanga community; and

(2). Whether the lower courts have failed to frame and try any issues material to the case.

In support of the contention that the suit is not maintainable under s. 539 of the Code of Civil Procedure the advocate for the appellants relies on *Jan Ali* v. *Ram Nath Mundul*(1); *Lutifunnissa Bibi* v. *Nazirun Bibi*(2); and *Wajid Ali Shah* v. *Dianat-ul-lah Beg*(3). But the Bombay High Court have held in *Thakersey Devraj* v. *Hurbhum Nursey*(4)

(1) I. L. R. 8 Cal., 32. (2) I. L. R. 11 Cal., 33.
(3) I. L. R. 8 All., 31. (4) I. L. R. 8 Bom., 432.

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that s. 539 is permissive and directory and not mandatory. According to the view they have taken that section does not prohibit a private suit and does not make the sanction of the Advocate-General a condition precedent. The scope, the object, and the meaning of the section are the subject of minute discussion in *Subbayya* v. *Krishna*(1) In that case Best and Weir, JJ. held that the provisions of the section include the hostile removal of a trustee for malversation, though not specified, while Sir T. Muthusawmy Iyer dissented from that view, holding that the section does not apply to a suit for the hostile removal of a trustee for malversation, and that " it leaves unimpaired or unlimited in any way in the interest of the charities the ordinary equitable jurisdiction exercised in an ordinary suit for the purpose of removing a trustee for misconduct, and obtaining such relief against him as is consequent on such removal." In this conflicting view of the meaning and scope of the section I do not feel myself justified in allowing the appellants' objection under it which is raised for the first time in second appeal.

The appellants' advocate cites *Jan Ali* v. *Ram Nath Mundul*(2) ; *Lutifunnissa Bibi* v. *Nazirun Bibi*(3) ; *Hira Lal* v. *Bhairon and others*(4) and *Raghubab Dial* v. *Kesho Ramanuj Das*(5), in support of his contention that the suit is not maintainable under s. 30 of the Code.

In the first of these cases an objection was taken in the written statement itself. It is not clear from

(1) I. L. R. 14 Mad., 186. (2) I. L. R. 8 Cal., 32.
(3) I. L. R. 11 Cal., 33. (4) I. L. R. 5 All., 602.
(5) I. L. R. 11 All., 18.

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the reports where objections were taken in the other cases. Section 34 requires that all objections for want of parties, &c., shall be taken at the earliest possible opportunity, and in all cases before the first hearing, and declares that any such objection not so taken shall be deemed to have been waived by the defendant. The appellants' advocate argues that the objections referred to in s. 34 do not contemplate objections based on s. 30. But an objection under the latter section that there are others who have the same interest in the suit as the plaintiffs and that such persons have neither been added as plaintiffs nor represented by the plaintiffs on record with the leave of the court is, I think, an objection for want of parties and must be made before the first hearing. After that it is not open to the defendants to object; though the court can, under s. 32, order that any person be joined as plaintiff. In the present case the defendants did not take the objection in the court of first instance. After a mass of evidence was recorded and four years after judgment had been passed against the defendants, the objection was taken in appeal, and, if the respondents' advocate's statement is correct, was not even then urged on the District Judge for consideration. The objection, even if it were a good one, was, I think, urged at too late a stage of the proceedings.

It has been held by the Bombay High Court in *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (1) that s. 30 is merely regulative and not constitutive. It indicates the procedure to be fol-

(1) I. L. R. 7 Bom., 324.

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lowed when it is intended to make the decision in a suit binding also on those who are not parties but have the same interest in it as the parties have. If such other persons are not represented with the leave of the Court and in the manner prescribed by s. 30 then we are to see whether the plaintiffs in themselves are entitled to the relief they ask for. It appears that the plaintiffs are the president and members of a committee appointed by the Devanga community with the sanction of the spiritual head, the Swami of the Ramachendrapur Mutt, for the purpose of settling all caste disputes and for managing the affairs of the temple. The main relief they ask for and which has been awarded to them is possession of the temple and its appurtenances. According to the finding of the lower courts and the admission of the defendants, the temple belongs to the Devanga community as a whole. But the whole community cannot manage it except through its representatives, the plaintiffs, who are therefore competent to sue for possession without joining with them all the members of the community whom they represent as plaintiffs.

The appellants' advocate suggests the following as the material issues which should have been framed and tried by the lower courts:—

(*a*) Whether the Guru of the Ramachendrapur Mutt could remove a trustee who has been in possession by hereditary right and who was not been appointed by the Guru ?

(*b*) Whether the Guru could excommunicate the 1st defendant without notice ?

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(c) Whether the Guru is only the spiritual head or has control also of the temporalities of the Devangas?

(d) Whether his excommunication existed at the time this suit was instituted?

I fail to see that any of these are relevant to the suit. The plaintiffs do not admit that defendant No. 1 is a hereditary trustee or that he was the sole manager of the temple. Their case seems to be that the temple belongs to the entire Devanga community; that it must be administered for the use and benefit of that class; that defendant No. 1 has been trying to make it a party temple for the use of himself and his friends and relatives by obtaining the Magistrate's order confirming him in possession, that they have been appointed by the Devanga community to manage the temple and its affairs with the sanction of the Guru and that therefore they are entitled to possession. The Guru's sanction or nomination may or may not be necessary. For the decision of the suit it is not necessary to try the above issues.

Misjoinder of causes of action, which is one of the grounds mentioned in the memorandum of second appeal, was not urged by the advocate at the hearing. It need not therefore be discussed.

The decree of the lower appellate court is confirmed and this second appeal is dismissed with costs.

Appeal dismissed with costs.

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MISCELLANEOUS APPEALS.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Judicial Commissioner.

KENCHETY DODANA (DEFENDANT) *v.* S. D. RAMA RAO (PLAINTIFF).*

1892 *March* 19.

Code of Civil Procedure (Act XIV of 1882*)*, *s.* 206—*Amendment of decree by lower court after appeal.*

After an appellate decree for possession of immovable property had been confirmed on second appeal, the lower appellate court amended it by inserting boundaries.

Held, that the effect of the amendment was not to alter the ultimate decree or to affect property other than that actually claimed and decreed. It was therefore not contrary to law. A court has power, under the Code of Civil Procedure s. 206, to amend a decree by bringing it into conformity with the judgment after it has been confirmed on appeal. *Ram Saran* v. *Persidhar Rai*(1) followed.

Mr. *Lawrance* for the appellant.

Mr. *L. Srinivasiengar* for the respondent.

The Order of the Officiating Judicial Commissioner (*Sir* H. N. D. PRENDERGAST) was as follows:—

In this case several plots of land were decreed to S. D. Rama Rao in appeal by the First Assistant Commissioner of Coorg. In the decree the boundaries of the plots were not specified. In second appeal to this court the decree of the lower appellate court was confirmed on 1st March 1890.

The decree-holder (Rama Rao) then applied to the First Assistant Commissioner for an amendment of the decree by inserting boundaries and the decree

* Appeal from Appellate order No. 5 of 1891 against the order of Mr. Brooke Leggatt, First Assistant Commissioner of Coorg, in Miscellaneous appeal No. 7 of 1891, dated the 19th day of September 1891, reversing the order of Mr. P. Eyannah, Subedar of Mercara, in Execution case No. 39 of 1891, dated the 24th day of August 1891.

(1) I. L. R. 10 All., 51.

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was accordingly amended by order dated 4th August 1890.

In execution the plaintiff applied to be put in possession of a plot marked *R*, the boundaries of which he specified in a schedule attached to his execution application. The original court refused to execute the decree on the ground that the boundaries of *R* were not separately given in the decree and that consequently it was incapable of execution.

In appeal the lower appellate court held that the decree was capable of execution with reference to a plan on the record in which the lots were set out, and ordered it to be executed.

This is an appeal from that order. It is urged by the appellant's advocate that the decree as amended by the lower appellate court cannot be executed as the amendment was made after the decree had been confirmed by this court and that the only decree which could be executed is the decree of this court which is the final decree in the suit.

The effect of the amendment was not to alter this court's decree or to affect property other than that actually claimed and decreed. The amendment was therefore not contrary to law. A court has power, under s. 206 of the Code of Civil Procedure, to amend a decree by bringing it into conformity with the judgment after it has been confirmed on appeal. In this view I am supported by the High Court rulings in *Sundara* v. *Subbanna*(1) and *Ram Saran* v. *Persidhar Rai*(2), which latter case is on all fours with the present case.

The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

(1) I. L. R. 9 Mad., 354. (2) I. L. R. 10 All., 51

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Before Colonel H. P. Peacock, Officiating Judicial Commissioner.

S. KRISHNA RAO (DEFENDANT) *v.* ARRE KARIBASHETTY (PLAINTIFF).*

1892. Sept 10.

Execution of decree—Code of Civil Procedure (XIV of 1882), ss. 373 and 647—Limitation Act (XV of 1877) Sch. II, Art. 179 cl. 4—Act VI of 1892 (An Act to amend the Indian Limitation Act 1877, &c.).

Where applications for execution made on the 12th August 1886 and 5th June 1889 were struck off for default of appearance, a subsequent application made on the 17th May 1892 was *held* not to be barred by limitation or under the Code of Civil Procedure s. 373. *Radha Charan* v. *Man Singh*(1) disapproved. Rulings of other High Courts *contra* followed, in accordance with Act VI of 1892.

The Order of the Officiating Judicial Commissioner (*Colonel* H. P. PEACOCK) was as follows :—

This is an appeal against the order of the District Judge of Coorg in Miscellaneous appeal No. 7 of 1892, confirming the order of the Second Assistant Commissioner of Coorg in Execution Case No. 31 of 1892.

Applications for execution of the decree in O. S. No. 82 of 1882, on the file of the Second Assistant Commissioner of Coorg, were made by the decree-holder on the 1st May 1884, on the 12th August 1886, on the 5th June 1889, and on the 17th May 1892. The second and third applications were struck off the file owing to the non-appearance of the parties on the day appointed by the court.

The judgment-debtor contends that the fourth ap-

* Appeal from Appellate order No. 1 of 1892 against the order of Mr. G. F. Meiklejohn, District Judge of Coorg, in Miscellaneous appeal No. 7 of 1892, affirming the order of Mr. M. Belliappa, Second Assistant Commissioner of Coorg, in Execution Case No. 31 of 1892, dated the 13th day of June 1892.

(1) I. L. R. 12 All., 392.

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plication of the 17th May 1892 is barred by limitation under the Limitation Act, Sch. II, Art. 179, Cl. 4. His advocate relies on the Full Bench ruling of the Allahabad High Court in *Radha Charan* v. *Man Singh* (1). That ruling has not been adopted as the correct view of the law by the other High Courts; see *Lakshmi Narasimha* v. *Atchanna*(2); *Wajihan* v. *Bishwanath Pershad*(3); *Shankar Bisto Nadyir* v. *Narasingh Rao Ramachandra*(4). The change which the law has since undergone by Act VI of 1892 is in conformity with the view of the majority of the High Courts according to which the application in question would not be barred.

The appeal is rejected.

Appeal rejected.

Before Colonel P. D. Henderson, C. S. I., Judicial Commissioner.

1892 Nov. 19.

KABINAHITHALU SANKAR BHATTA AND ANOTHER (DEFENDANTS) v. SAVAL DOSS JATANAND SAIT AND ANOTHER (PLAINTIFFS).*

Local investigation—Code of Civil Procedure (Act XIV of 1882) s. 260—Compromise of decree—Extension of time for payment of decree amount—Act—Decree.

A mortgage decree was modified by agreement of the parties, whereby the first instalment of the mortgage-debt became payable on a certain date, but in default the judgment-debtors were to make over the crop of the mortgaged properties to the decree-holders and make good any deficit before eight months further had elapsed, so that virtually the time for payment of the first instalment was extended to the latter date. If by that date default was made, then the judgment-debtors became liable to pay the whole of the decree amount at once. One of the terms of the compro-

* Appeal from order No. 1 of 1892, against the order of Mr. G. F. Meiklejohn, District Judge of Coorg in Execution Case No. 18 of 1892.

(1) I. L. R. 12 All., 392. (2) I. L. R. 15 Mad., 240.
(3) I. L. R. 18 Cal., 462. (4) I. L. R. 11 Bom., 467.

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mise, incorporated in the decree thereon, was that the judgment-debtors should cultivate and keep in proper order their estates. Before the further time abovementioned for payment of the first instalment (by making over the crop &c.) had expired, the decree-holders made an application for execution, which the District Judge appeared to treat as one for enforcement of the decree on compromise by attachment of the judgment-debtor's property under s. 260 of the Code of Civil Procedure; and he ordered a local investigation as to whether the judgment-debtors had cultivated and kept their estates in proper order agreeable to the terms of such compromise.

Held, that the application to recover the amount of decree was premature and could not be admitted.

Also, to enforce obedience under the Code of Civil Procedure s. 260 it is necessary that the decree must direct performance of or abstention from a particular act. Cultivating an estate and keeping it in order is not a particular act but a series of constantly recurring acts. Moreover keeping an estate in working order is an elastic expression. What constitutes proper working order from one man's point of view may not bear the same significance in the opinion of another. The "act" contemplated by the section cannot be one of this nature.

Further, it is doubtful if the stipulation as to working the estates could legally form part of the decree as defined by the Code. It was neither a right claimed nor a defence set up in the suit, but was one of the terms of the compromise, a collateral agreement which, though incorporated in the decree, does not fulfil the requirements of a decree and cannot therefore be treated as such. *Sri Krishna Tata Chariar* v. *Singara Chariar*(1) approved and followed.

Mr. *L. Srinivasiengar* for the appellants.

Mr. *Lawrance* for the respondents.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

This is an appeal from the order of the District Judge of Coorg in execution case No. 18 of 1892 on his file, in which he ordered a local investigation as to whether the judgment-debtors have cultivated and kept in proper order their estates agreeable to

(1) I. L. R. 4 Mad., 219.

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the terms of the compromise concluded in O. S. No. 6 of 1887.

Whether the decree-holders want to recover the decree amount by the attachment and sale of the properties described in the decree, or wish merely to enforce the terms thereof by attachment of the judgment-debtors' properties under s. 260 of the Code of Civil Procedure is not clear. Apparently they seek for the former relief, for they ask for the attachment and sale of all the immovable properties described in the decree with their standing crop. An execution application for such a relief appears to be premature, for the decree seems to have been modified by an agreement of the 12th June 1891 according to which the first instalment, of Rs. 13,000, became payable on the 1st July 1892, but in default the judgment debtors were to make over the crop on the estate to the decree-holders and make good the deficit, if any, by the 31st March 1893, so that virtually the time for payment of the first instalment extends up to the latter date. If they fail to pay up the instalment by that date, they become liable to pay the whole of the decree amount at once. It is therefore clear that the present application to recover the decree amount is premature and cannot be admitted.

The District Judge appears to have treated the application as one for enforcement of the terms contained in para 8 of the decree by the attachment of the judgment-debtor's properties under s. 260 of the Code of Civil Procedure. It is contended for the appellants (1) that the application is defective inasmuch as it does not give the necessary information

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as to the result of previous applications as required by s. 235 of the Code, and (2) that s. 260 is not applicable to the case. As regards the first objection I must observe that the particulars given in para 7 of the execution application seem to be sufficient but the second objection must prevail.

To enforce obedience under s. 260 it is necessary that the decree must direct performance of, or abstention from a particular act. Now cultivating an estate and keeping it in order is not a particular act but is a series of constantly recurring acts extending in the present case over a period of twelve years. Moreover keeping an estate in working order is an elastic expression. What constitutes proper working order from one man's point of view may not bear the same significance in the opinion of another. The "act" contemplated by s. 260 cannot be an act of this nature. In *Sri Krishna Tata Chariar* v. *Singara Chariar*(1), the decree directed that the sacred rice allowed daily and on important occasions in a certain pagoda should, from time to time, be given to the plaintiff. The Madras High Court held that the decree was too indefinite to admit of execution in the manner contemplated by the Code. The principle of that decision applies to this case.

Further I doubt if the stipulation regarding the working of the estates could legally form part of the decree as defined in the Code. Decree means "the formal expression of an adjudication upon any right claimed, or defence set up, in a civil court when such adjudication, so far as regards the court expressing it, decides the suit or appeal." In this

(1) I. L. R. 4 Mad., 219.

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case the suit was to recover a mortgage-debt by the sale of the mortgaged properties: and the defence set up was that the plaintiffs had no cause of action, that the suit was not maintainable and so forth. That the defendants should keep the estate in working order was neither a right claimed nor a defence set up in the suit, but it is one of the terms of the compromise and is therefore a collateral agreement which, though incorporated in the decree of the court, does not fulfil the requirements of a decree and cannot therefore be treated as such.

The District Judge's order is therefore set aside and the execution application ordered to be rejected. The respondents are directed to pay the appellants' costs of this appeal.

Appeal allowed with costs.

APPELLATE CRIMINAL.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Judicial Commissioner.

1892 Feb. 27.

NARASA (ACCUSED) v. QUEEN-EMPRESS.*

Withdrawn confession—Inculpatory admission—Corroboration.

A mere inculpatory admission, which falls short of being an admission of guilt is not a confession. The statement of an accused which does not inculpate himself does not therefore amount to a confession. Even could it be construed as an admission of criminating circumstances, still, as it was withdrawn before the Sessions Court, it is necessary to see whether it is corroborated by independent reliable evidence. *Queen-Empress* v. *Rangi*(1) and *Queen-Empress* v. *Bharmappa*(2) followed.

* Criminal Appeal No. 7 of 1891, against the conviction and sentence in Sessions case No. 23 of 1891, of Mr. G. F. Meiklejohn, Sessions Judge of Coorg, dated the 18th day of December 1891.

(1) I. L. R. 10 Mad., 295. (2) I. L. R. 12 Mad., 123.

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Mr. *Lubeck* for the accused.

The *Government Prosecutor* (Mr. *Lawrance*) for the Crown.

The Judgment of the Officiating Judicial Commissioner (*Sir* H. N. D. PRENDERGAST) was as follows:—

Narasa, the appellant in this case, has been convicted of abetment of murder under ss. 114 and 302 of the Indian Penal Code and sentenced to transportation for life.

The evidence for the prosecution shows that a child of three who was hale and hearty was suddenly taken ill in his village, vomiting and purging violently, on the evening of the 12th November last and expired a few hours later. On the following day after the body had been interred, the village Patel who saw the vomited and purged matter entertained some suspicion about the cause of death and the case was reported to the police.

As the deceased boy's parents had often quarrelled with Huchi, their neighbour, suspicion was cast upon her and both she and her friend Mali were arrested by the police on the 13th November. Their statement to the police was to the effect that while they were in Mali's verandah, Narasa came and called the boy into the house offering him plaintain and jaggery and gave him something to eat, for the boy came out licking his lips. Subsequently Mali made another statement before the police implicating both Huchi and Narasa. She was afterwards released and has since figured as a witness in the case.

On the 14th November the body was exhumed and sent to the Civil Surgeon at Mercara, who sent the stomach, bowels, liver and certain clothes stained

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with vomited and purged matter to the Chemical Examiner for analysis, and the latter certified that from the amount of arsenic present it was clear death was due to arsenical poisoning.

On the 15th November Narasa was arrested by the police, who after examining him took him on the 17th November to the Second Class Magistrate of Nanjarajapatna Taluk, who recorded his statement. In that statement he admits that on the 11th November Huchi gave him four annas with the request that arsenic of that value might be purchased at Ramasawmy Kanve market and supplied to her as she wanted it for the purpose of destroying rats which infested her house; that he accordingly purchased the arsenic from a Komati merchant, whom he did not know, and took it home; that on the following day he took it to Hanuma's house; that Huchi, who was seated with Mali in Mali's house, beckoned to him; that he went there, and on Huchi asking for the arsenic he gave it to her; that she entreated him to keep the matter secret; that she then went to her house, brought a plantain and, after Mali had left to fetch water, filled half of the plantain with the arsenic and gave it to the deceased boy and the other half to her own son to eat. Before the committing magistrate Narasa admitted the correctness of this statement and Huchi repeated what she had stated before the police, but before the Sessions Court both of them retracted all their previous statements and pleaded not guilty denying all knowledge of the cause of the boy's death. The following is the purport of the evidence of Mali the only eye-witness in the case.—Huchi had plantain

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and jaggery in her cloth; she called the boy and offered him some; the boy came; then Huchi, Narasa and the boy went inside and the boy came out licking his lips. "I asked Huchi what she gave him and she said plantain and jaggery. Then I went to fetch water. When I returned, Huchi and Narasa had gone to Huchi's house; Huchi's children were near the door. I did not see her give anything to them."

The Sessions Judge has acquitted Huchi, who was charged with murder, refusing to believe the improved story of Mali who at first did not implicate her before the police, and he has based Narasa's conviction mainly on his own withdrawn confessional statement and on the fact that he pointed out the Komati merchant from whom he had purchased the arsenic and was seen in Mali's house on the day of the child's death. If Mali's evidence against Huchi is not worthy of credit, it cannot safely be relied on against Narasa unless it be corroborated by reliable evidence.

According to the decision of the Allahabad High Court in *Queen-Empress* v. *Jagrup*(1) a mere inculpatory admission which falls short of being an admission of guilt is not a confession. The statement of Narasa does not therefore amount to a confession. In no part of that statement does Narasa inculpate himself. He seems to have supplied the arsenic in good faith without any knowledge of the real purpose for which Huchi wanted it.

Even if his statement could be construed into an admission of criminating circumstances, still, as the

(1) I. L. R. 7 All., 646.

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truth of that admission was denied by the prisoner before the Sessions Court, it is necessary to examine and see, as laid down in *Queen-Empress* v. *Rangi*(1) and *Queen-Empress* v. *Bharmappa*(2) whether the withdrawn statement is corroborated by independent reliable evidence. On perusal of the evidence I find that this is not the case. The Komati merchant from whom the arsenic is said to have been purchased has no recollection of the fact. The prisoner's statement that after he handed over the arsenic to Huchi, she went to her house, brought a plantain and, after Mali had left the house to fetch water, put it in half a plantain and gave it to the deceased, is contradicted by Mali, who states that Huchi had the plantain in her lap and gave the boy something to eat inside her house while she was in the verandah and before she went to fetch water.

Mali's evidence is also a complete departure from what she had stated at first before the police, when she made no mention of Huchi.

The evidence of Runga goes to show that it was Narasa who called the boy, but this is contradicted by Mali who says that Huchi called the boy.

The fact that Narasa was seen in Mali's house on the evening of the child's death is consistent with his version of the case and does not necessarily lead to a presumption of his guilt.

Under these circumstances the evidence on record is not in my opinion sufficient to uphold the conviction. I therefore set aside the finding and sentence

(1) I. L. R. 10 Mad., 295. (2) I. L. R. 12 Mad., 123.

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of the Sessions Judge and direct that the appellant Narasa be acquitted and released. 1892

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Conviction set aside. Accused acquitted.

CRIMINAL REVISION.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Judicial Commissioner.

1892 April 12.

INANDA APPANA (COMPLAINANT) v. PUTTAPANDA KARIAPPA AND THREE OTHERS (ACCUSED).*

Theft of crop—Plea of possession of the land—Declaratory decree—Conclusiveness of such decree in a criminal court—Interference by High Court with finding of acquittal.

On a charge of theft of paddy from a field, the complainant relied upon judgments that declared his father's title to the field and the accused aduced oral evidence that they were in possession.

Held, that though in the civil suits evidence on the question of possession was adduced by both parties, yet there was no distinct issue or finding on that point. Therefore the fact that the plaintiff (complainant's father) had obtained a declaration of title was not conclusive proof of his being in possession. The accuseds' plea of possession was therefore a good one, if true, and they were not debarred by the civil judgments from proving it.

Further, that, as the evidence on the question of possession consisted of oral testimony, and the decision as to the truth or otherwise of the plea depended upon appreciation of evidence, the High Court should not interfere with the order of acquittal made by the magistrate.

The Order of the Judicial Commissioner (*Sir* H. N. D. PRENDERGAST) was as follows :—

This is a case referred by the District Magistrate of Coorg under s. 438 of the Code of Criminal Procedure.

Inanda Appana, the complainant, charged Puttapanda Kariappa and Nanjappa with theft of paddy

* Criminal Revision No. 10 of 1891, on reference made by Mr. Brooke Leggatt, District Magistrate of Coorg, dated the 16th day of November 1891, in Criminal Case No. 27 of 1891 on the file of the Parpatigar and Third Class Magistrate of Ammattinad.

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from a field which he alleged was in his possession and was his property, on the 7th January 1891. He based his title on *Exs.* A and *B*, the judgments of the Subedar of Yadanalknad Taluk and the First Assistant Commissioner of Coorg respectively, and on oral evidence.

The accused pleaded that the field was in their possession and that the judgments relied on by the complainant only declared his father's title to it. They adduced oral evidence as to possession. The Parpatigar Magistrate of Ammattinad who tried the case acquitted the accused on the ground that they appeared to be in possession of the field though it had been decreed to the complainant's father and that it had not been made over to the complainant or his father in execution.

The District Magistrate thinks that the Parpatigar Magistrate has misconstrued the effect of the judgments *Exs.* *A* and *B*, which were passed in a suit for declaration of title and not for possession, and that he was not justified under the circumstances in basing his order on the oral testimony of witnesses.

For the disposal of this reference, it is necessary to know what the suit in question was for. Inanda Nanjappa, father of the complainant, brought O. S. No. 169 of 1888 in the Court of the Subedar of Yadanalknad Taluk against the first accused P. Kariappa to establish his right to the field in question and to declare certain boundary stones to be genuine. The defence in that suit was that the land had been in possession of the defendant for seventy years and formed part of his land. The main issues

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framed were whether the field formed part of the plaintiff's or the defendants' *warg* and whether the stones were genuine.

In the original court the plaintiff succeeded and obtained a decree as prayed for. The defendant appealed and one of the grounds urged in appeal was that the suit was barred by limitation. The appellate court therefore remanded the suit for trial of an issue on the question of limitation. The original court found that the suit was barred but the appellate court did not agree with that finding and confirmed the lower court's decree.

As the suit was for a declaratory decree it was incumbent on the civil courts to decide in the first instance whether the plaintiff was in possession of the field, for the defendant contended that he was in possession and if his contention was true the suit as framed was not maintainable. Though oral evidence seems to have been adduced by both parties on the question of possession yet there was no distinct issue or finding on that point. Therefore the the fact that plaintiff obtained a declaration of title is not conclusive proof of his being in possession. Under these circumstances the accused's plea of possession, if true, is a good one and they are not debarred from proving it by the judgments in the civil suit.

Whether the plea is true or not is a matter of appreciation of evidence. Seeing that the evidence on both sides as to the question of possession consisted of the oral testimony of witnesses I decline to interfere with the order of acquittal.

Acquittal upheld.

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Before General Sir H. N. D. Prendergast, Officiating Judicial Commissioner.

1892
April 12.

QUEEN-EMPRESS *v.* KEREYABADAGARA MUDIA (ACCUSED).*

Excise Act (*XXII of* 1881) *ss.* 35 *and* 3—*Fermented liquor—Poola Conjee* (*boiled rice*).

Where a person was convicted under s. 35 of the Excise Act for having in his possession *poola conjee* or boiled rice, *Held* that, as such a preparation does not come under the definition of fermented liquor as given in s. 3 of the Act, the conviction was wrong.

The Order of the Officiating Judicial Commissioner (*Sir* H. N. D. PRENDERGAST) was as follows:—

This is a case submitted by the District Magistrate of Coorg under s. 438 of the Code of Criminal Procedure, with the recommendation that the conviction of the accused in Criminal Case No. 145 of 1891 on the file of the Second Class Magistrate of Kigatnad Taluk under s. 35 of the Excise Act (XXII of 1881) may be quashed as illegal and the fine ordered to be refunded.

The accused was charged under s. 35 of the Act with making fermented liquor and sentenced to pay a fine of Rs. 100, in default to suffer rigorous imprisonment for two months. It appears that two pots of *poola conjee* (boiled rice) were found in the loft of the accused's house. Country arrack is distilled from such *conjee* and the preparation is a process preliminary to distillation. But no still was found in his possession, though his intention might have been to manufacture arrack out of the preparation, yet, as *poola conjee* does not come under the definition of fermented liquor as given in

* Criminal Revision No. 1 of 1892, on reference made by Mr. Brooke Leggatt, District Magistrate of Coorg, dated the 7th day of March 1892 in Criminal Case No. 145 of 1891, of the Subedar and Second Class Magistrate of Kigatnad Taluk.

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s. 3 of the Act, I agree with the District Magistrate in his view and hold that the conviction is wrong. It is therefore quashed and the fine, if levied, is ordered to be refunded to the accused.

Conviction set aside.

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QUEEN-EMPRESS v. KEREYABA-DAGARA MUDIA.

Before Colonel H. P. Peacock, Officiating Judicial Commissioner.

THE QUEEN-EMPRESS *v.* MANIKAM (ACCUSED).*

1892 Sept. 1.

Advances—Breach of Contract—Cheating—Fraudulent or dishonest intention—Penal Code (Act XLV of 1860), *s.* 417—*Breach of Contract Act* (*XIII of* 1859).

A conviction for cheating of a person who took an advance from the complainant and left his service shortly afterwards without notice, cannot be upheld where there is no positive evidence of fraudulent or dishonest intention on the part of the accused at the time of taking the advance. Mere breach of contract is not even *primâ facie* evidence of an original fraudulent intention. *In re Viraswami, Accused*(1) followed.

The Order of the Officiating Judicial Commissioner (*Colonel* H. P. PEACOCK) was as follows :—

This is a reference by the Sessions Judge of Coorg submitting, under s. 438 Criminal Procedure Code, the proceedings of the District Magistrate in Criminal Case No. 59 of 1892 for revision.

In this case the accused obtained an advance of Rs. 6 from the complainant, whose service he joined on the 14th May last and left it without notice on the 16th idem. The accused was convicted of cheating under s. 417 of the Indian Penal Code and sentenced to one month's rigorous imprisonment. The Sessions Judge is of opinion that the conviction is

* Criminal Revision No. 4 of 1892, on reference made by Mr. G. F. Meiklejohn, Sessions Judge of Coorg, dated the 15th day of August 1892 in Criminal Case No. 59 of 1892 of the District Magistrate of Coorg.

(1) Weir's Crim. Rulings, p. 285.

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QUEEN-EMPRESS v. MANIKAM.

wrong, as there is no proof of original fraudulent intention: and the case should have come under the Breach of Contract Act.

There is no positive evidence in the present case of fraudulent or dishonest intention on the part of the accused at the time of taking the advance, so as to sustain the conviction of cheating: mere breach of contract is not even *primâ facie* evidence of an original fraudulent intention. In a somewhat similar case, Revision Case No. 88 of 1881, *Viraswami, Accused*(1) the Madras High Court annulled the conviction of cheating.

The conviction must be set aside: but as the accused has already undergone the sentence, his trial under the Breach of Contract Act need not be ordered.

Conviction set aside.

Before General Sir H. N. D. Prendergast, Officiating Judicial Commissioner.

1892 October 11.

THE QUEEN-EMPRESS *v.* KALI ALIAS SULTANBI (ACCUSED).*

Milk diluted with water—Penal Code (Act XLV of 1860), ss. 272 and 273.

Mixing water with milk does not render the milk injurious to health so as to make the act an offence under ss. 272 and 273 of the Indian Penal Code.

The Order of the Officiating Judicial Commissioner (*Colonel* H. P. PEACOCK) was as follows:—

This is a case submitted by the District Magistrate

* Criminal Revision No. 5 of 1892, on reference made by Mr. Brooke Leggatt, District Magistrate of Coorg, dated the 9th day of September 1892, in Criminal Case No. 86 of 1892 of the Subedar and Second-Class Magistrate of Mercara taluk.

(1) Weir's Crim. Rulings, p. 285. *See* also Crim. Revn. Case No. 38 of 1882, in which the High Court ruled the same.

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of Coorg under s. 438 of the Code of Criminal Procedure for revision of the finding and conviction in Criminal Case No. 86 of 1892 on the file of the Subedar Magistrate of Mercara taluk, in which the accused a milk-woman was charged under s. 272 of the Indian Penal Code for selling milk diluted with water and was sentenced to undergo ten days rigorous imprisonment.

1892

QUEEN-EMPRESS v. KALI.

Mixing water with milk does not render the milk injurious to health so as to make it an offence under ss. 272 and 273 of the Indian Penal Code.

The conviction is therefore quashed.

Conviction set aside.

Before Colonel P. D. Henderson, C. S. I., Judicial Commissioner.

WRIGHT (COMPLAINANT) v. HOONEY (ACCUSED).*

1892 Dec. 8.

Advances—Breach of Contract Act (XIII of 1859) s. 2—Imprisonment in default—Costs.

An accused under the Breach of Contract Act (XIII of 1859) was ordered to repay advances and costs or in default to suffer rigorous imprisonment.

Held, that it was illegal to direct imprisonment in anticipation of non-compliance by the accused with an order to carry out his contract or repay the advance. Sentence of imprisonment should only be passed in the event of the accused not complying with such order.

It was also illegal to inflict imprisonment in default of payment of the costs: they can only be recovered in the prescribed manner.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

This is a reference under s. 438 of the Code of

* Criminal Revision No. 7 of 1892, on reference made by Mr. Brooke Leggatt, District Magistrate of Coorg, dated the 23rd day of November 1892 in Criminal Case No. 427 of 1892 of the Subedar and Second-Class Magistrate of Mercara taluk.

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1892

WRIGHT v. HOONEY.

Criminal Procedure by the District Magistrate of Coorg submitting for the orders of this court the proceedings of the Subedar Magistrate of Mercara taluk in Criminal Miscellaneous No. 427 of 1892.

The accused was convicted under s. 2 of Act XIII of 1859 and ordered to repay to the complainant Rs. 200 being the sum advanced together with Rs. 1-4-0 his costs before the rising of the court, or in default to suffer rigorous imprisonment for three months or until the sum of Rs. 201-4-0 be sooner repaid.

Section 2 of the Act contemplates an order in the first instance directing the accused to carry out the contract or repay the advance. In the event of his not complying with such order the magistrate must proceed to pass sentence of imprisonment. To pass an order to fulfil the contract or repay the advance as the case may be and by the same order to direct his imprisonment in anticipation of his non-compliance with the same is therefore wrong. In the present case no substantial injustice will be done to the accused by allowing the sentence of imprisonment to stand as he will be liberated on repaying the amount. Therefore I decline to quash the sentence of imprisonment. But the latter part of the order which directs his release on payment of Rs. 201-4-0 is illegal.

I therefore modify the order and direct that the imprisonment shall cease on the accused paying the sum of Rs. 200 before the expiration of three months, the court costs being recoverable in the prescribed manner.

Conviction upheld. Order modified.

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Before Colonel P. D. Henderson, C. S. I., Judicial Commissioner.

1892 Dec. 8.

MANJIA (COMPLAINANT) v. KUKANA (ACCUSED).*

Advances—Breach of Contract Act (XIII of 1859) *s.* 2—*Imprisonment in default—Costs.*

An accused under the Breach of Contract Act (XIII of 1859) was ordered to repay advances and costs or in default to suffer rigorous imprisonment.

Held, that it was illegal to direct imprisonment in anticipation of non-compliance by the accused with an order to carry out his contract or repay the advance. Sentence of imprisonment should only be passed in the event of the accused not complying with such order.

The Act does not authorise the inclusion of complainant's costs in the sum which the accused is to repay and to direct his imprisonment until they are paid. Complainant's costs are recoverable under other enactments.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

The District Magistrate of Coorg submits for revision under s. 438 of the Code of Criminal Procedure the proceedings of the Subedar Magistrate of Mercara Taluk in Criminal Miscellaneous Case No. 429 of 1891.

In this case the accused was convicted under s. 2 of Act XIII of 1859 and ordered to repay to the complainant the advance sum of Rs. 30 together with Rs. 5-4-0 his costs in the case before the rising of the court, or in default to suffer rigorous imprisonment for two months or until the sum of Rs. 35-4-0 be sooner repaid.

The Magistrate was wrong in passing sentence of imprisonment in anticipation of the accused's non-

* Criminal Revision No. 8 of 1892, on reference made by Mr. Brooke Leggatt, District Magistrate of Coorg, dated 23rd day of November 1892, in Criminal Case No. 429 of 1891 of the Subedar and Second-Class Magistrate of Mercara taluk.

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NANJIA v. KUKANA.

compliance with the order as to repayment. The section contemplates two orders, one directing the accused to carry out the contract or repay the advance at the option of the complainant, and the other directing his imprisonment in the event of his failing to comply with the first order. The Act does not authorize the Magistrate to include the complainant's costs in the sum which the accused is to repay and to direct the latter's imprisonment until the costs also are paid. Complainant's costs are ordered to be repaid under the provisions of other enactments.

In the circumstances of the case, I see no necessity to quash the conviction and sentence entirely, but I would only modify the latter part of the magistrate's order and direct that the accused be released on his paying Rs. 30 before the expiry of the two months, the court fees being recoverable in the prescribed manner.

Conviction upheld. Order modified.

Before General Sir H. N. D. Prendergast, K. C. B., Officiating Judicial Commissioner.

1892 March 19.

ERAMA (COMPLAINANT) v. SIDAPA CHETTY (ACCUSED).*

Refund of compensation—Enforcement of order for refund—Attachment of property—Disposal of claims—Civil suit.

If there is any dispute regarding the ownership of property attached by a criminal court, it is inadvisable to order a sale until the claimant has had an opportunity of establishing his claim in a civil court.

* Criminal Revision Petition No. 9 of 1891, against the order of the District Magistrate of Coorg, affirming the order by the Second-Class Magistrate of Yelusavirashame Taluk, in Criminal No. 22 of 1891, dated the 3rd day of October 1891.

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ERAMA v. SIDDAPPA CHETTY.

The Order of the Officiating Judicial Commissioner (*Sir* H. N. D. PRENDERGAST) was as follows:—

Erama the petitioner charged Sidapa Chetty with criminal breach of trust and he was convicted of the offence and fined Rs. 200 by the Second-Class Magistrate of Yelusavirashame Taluk. From the amount of the fine Rs. 150 were paid to the complainant as compensation. The conviction was affirmed by the District Magistrate but was quashed by this Court and she was ordered to repay the compensation to Sidapa Chetty. As she failed to repay it, the coffee crop of a garden which was alleged to be hers was attached. Sidapa Chetty claimed the garden under a registered sale-deed dated 6th August 1888 executed in his favor by the said Erama. The Second-Class Magistrate after hearing the evidence on both sides was of opinion that the garden was in the possession of Sidapa Chetty as purchaser and ordered the crop to be released, subject to confirmation by the District Magistrate and the latter officer has confirmed the order. The objection taken by the petitioner is that Sidapa Chetty should have established his claim in a civil court and that the order for release is illegal.

If there is any dispute regarding the ownership of property attached, it is inadvisable to order a sale until the claimant has had an opportunity of establishing his claim in a civil court as held by the Madras High Court. *See* Weir's Criminal Rulings, p. 988.

In the present case the property has been ordered

1892

ERAMA v. SIDDAPPA CHETTY.

to be released. If the petitioner is aggrieved she has her remedy in the civil courts.

I see no reason to interfere and I reject the petition.

Order confirmed. Application rejected.

Before Colonel H. P. Peacock, Officiating Judicial Commissioner.

1892 *July* 30.

GINAMA AND TWO OTHERS (PETITIONERS).*

Sanction to prosecute—Appeal—Code of Criminal Procedure (Act X of 1882), s. 185.

Section 195 of Act X of 1882 declares that any authority to which the authority giving or refusing sanction is subordinate, may revoke or grant such sanction. There is therefore by this enactment an appeal to the Sessions Court from an order of a subordinate magistrate granting sanction to a prosecution for forgery and perjury.

Mr. *Lawrance* for the petitioners.

The Order of the Officiating Judicial Commissioner (*Colonel* H. P. PEACOCK) was as follows:—

Sanction was granted by the Second Assistant Commissioner of Coorg for the prosecution of the petitioners for forgery and perjury. They appealed to the Sessions Judge of Coorg to revoke the sanction, but the appeal was rejected on the ground that no appeal lies from such an order under s. 195 of the Code of Criminal Procedure. In support of that proposition the Sessions Judge quotes some decisions in his order. He appears however to have

* Criminal Revision Petition No. 4 of 1892, against the order of Mr. G. F. Meiklejohn, Sessions Judge of Coorg, in Criminal Miscellaneous Appeal No. 3 of 1892, dated the 6th day of May 1892, confirming the order of the Second Assistant Commissioner, dated the 28th day of March 1892.

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overlooked the fact that these decisions were passed under the old law, which has since been materially changed by s. 195 of Act X of 1882, declaring that any authority to which the authority giving or refusing sanction is subordinate may revoke or grant such sanction. The Sessions Judge's order is therefore set aside and he is directed to rehear the appeal and decide it according to law.

1892

GIMANA, PETITIONER.

Order quashed. Remanded.

MISCELLANEOUS APPLICATION.

Before Colonel P. D. Henderson, C. S. I., Judicial Commissioner.

D. THAMANA (COMPLAINANT) v. W. S. SULLIVAN (ACCUSED).*

1892 November 24.

European British Subject—High Court—Jurisdiction.

The Judicial Commissioner of Coorg has no criminal jurisdiction over European British Subjects. The Madras High Court exercises original and appellate criminal jurisdiction in such cases in Coorg.

Mr. *J. W. Hayes, Jr.* for the petitioner.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

This is an application under s. 526 of the Code of Criminal Procedure for transfer of a criminal case filed by the petitioner in the Court of the District Magistrate of Coorg.

The accused being an European British Subject this court has no jurisdiction over him. For, in reference to proceedings against European British Subjects, "High Court" means "the High Courts

* Criminal Petition No. 8 of 1892, praying for transfer of a Criminal Case on the file of the District Magistrate of Coorg.

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of Judicature at Fort William, Madras and Bombay, the High Courts of Judicature for the North-West Provinces, the Chief Court of the Punjab and the Recorder of Rangoon;" and by notification issued by the Governor-General in Council it is the Madras High Court that exercises original and appellate criminal jurisdiction in such cases in Coorg.

The application is therefore rejected.

Application rejected.

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APPENDIX.

No. I (*see* page 160).

RAMACHAR (PLAINTIFF) *v.* MUNIAPPA (DEFENDANT).*

1892 *March* 14.

Onus of proof—Contract Act (IX of 1872), s. 69—Contribution —Voluntary discharge of another's liability—Right to recover from person legally liable.

The judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows :—

We are of opinion that the suit has been rightly dismissed by the lower court.

The plaintiff obtained a potta for two lands, bearing survey Nos. 82 and 85, but the possession was with the defendant. He brought a suit for the possession of these lands and it was ultimately decided by the Chief Court that the plaintiff was entitled only to land No. 85. The relief sought in the present suit was to obtain damages in the shape of the mesne profits of land No. 85 during the years Vyaya and Sarvajitu, and for the kundayem paid for survey No. 82, which was adjudged in favor of the defendant, during the years Parthiva, Vyaya, and Sarvajitu.

The lower court rejected the claim for the produce of the year Vyaya on the ground that it was not adjudged though claimed in the former suit, and held with regard to the year Sarvajitu that there was no evidence to prove that there was any produce. The claim for the contribution of kundayem was also dismissed on the ground that section 69 of the Contract Act did not apply, and that the defendant was not bound to contribute.

The appeal to this court is limited to the claim to produce for the year Sarvajitu, and the ground of objection taken is that the onus of proof has been wrongly thrown on the plaintiff. We are of opinion that this objection is untenable. The evidence adduced by the defendant goes to show that in some years there was no produce at all, while in others, the whole had been heaped up by the revenue authorities and destroyed, not having been harvested in due time. This evidence is not rebutted by the plaintiff and there seems to be no reason to question the correctness of the Munsiff's finding.

Regarding the kundayem paid on survey No. 82, the Munsiff has rightly held that the plaintiff is not entitled to any contribution.

* Appeal No. 253 of 1891 against the decree of the Munsiff of Chickaballapur in O. S. No. 142 of 1890.

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RAMACHAR *v.* MUNIAPPA.

The defendant might no doubt have been benefited by the payment made by the plaintiff, but this fact *per se* does not entitle the plaintiff to be reimbursed. His payment was voluntary and he did not pay in order to guard his own interest against any default by the defendant, or with any consciousness that the defendant was bound to pay. He made the payment with the intention of supporting his alleged title to the land. In the end it was found that he was a trespasser and a wrong doer, so far as land No. 82 was concerned; at the time he made the payment of the kundayem, he made it appear that he believed that he himself was bound to pay; and it was in the discharge of such liability which he voluntarily imposed upon himself without any foundation of a legal or equitable right, that he paid. To use the words of Garth, C. J., in the case of *Tiluck Chand* v. *Soudamini Dasi*(1) "whatever sums she might have paid in respect of it while she was thus in possession were paid in her own wrong. She had no right legally or equitably to intermeddle with the property at all; and it is not because payments which she made may have enured to the benefit of the rightful owner that the latter is bound to recoup her for those payments. If *A* pays *B's* debts, supposing he has authority to do so, but in fact having no such authority, he cannot recover the amount against *B*; and if *A* innocently obtains possession of *B's* horse and wrongfully holds possession of it, believing that he has a right to do so, he cannot claim from *B* the price of food or medicine which he may have supplied to the horse, although the horse would have died without such food or medicine and *B* alone may have benefited by *A's* expenditure." These views were followed by the judges of the Allahabad High Court in the case of *Binda Kuar* v. *Bhonda Das*(2) and we have no hesitation in adopting them. The result is that this appeal will be dismissed with costs.

Appeal dismissed with costs.

No. II (*see* page 241).

1891
May 25.

GANGARAM (JUDGMENT-DEBTOR) *v.* RUDRANA (AUCTION-PURCHASER).*

Code of Civil Procedure (Act XIV of 1882), ss. 230, 245, 259, 260, 312, 316, 318, 319—Limitation Act (XV of 1877), Sch. II Art. 178—Confirmation of sale—Grant of certificate—Limitation for application for certificate—Absence of application to court for confirmation—Power of court to confirm proprio motu.

The judgments of the Chief Court ((THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) were as follows:—

KRISHNA MURTI, J.—Rudrana, who had purchased a house at a

* Miscellaneous Appeal No. 45 of 1890 against the order of the Munsiff of Bangalore in Civil Miscellaneous Case No. 564 of 1890.

(1) I. L. R. 4 Cal., 568. (2) I. L. R. 7 All., 660.

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court-sale on the 8th January 1880, applied to the Munsiff of Bangalore on the 8th September 1890, for a sale-certificate, under s. 316 of the Code of Civil Procedure.

The Munsiff passed the following order:—

"The application which should have been made within three years from the date on which the right to apply accrues, is made now. The executions do not show that the petitioner's sale was ever confirmed up to date. By operation of law, the confirmation may take place any time after sixty days from sale. The sale is now confirmed.

"The application for sale-certificate should be made within three years from the date on which the right to apply accrues. Such a right does not accrue, in my opinion, till after the confirmation of the sale. Certificate may therefore be granted."

Gangaram, the first defendant in the civil suit in which the sale was held, has appealed to this court against the granting of the sale-certificate, and one of the objections taken is, that the lower court failed to notice the fact of two similar applications having been made by the respondent and duly rejected in Mis. Nos. 660 and 694 of 1889. There is nothing in these records to show that the applications were refused. I understand that, in one of them, objection was taken to the wording of the petition and in the other a remark has been made by the Munsiff to the effect that the applicant should show that the sale has been confirmed, as there is nothing in the execution proceedings to show that the sale has been confirmed. These records do not in my opinion show that the matter of this petition was decided by the Munsiff and the objection based on this ground must, it seems to me, fail.

The second objection taken is that the sale should not have been confirmed after the original decree was barred. No authority has been quoted in support of this contention, and as the confirmation in this case was made by the court of its own motion, I hold that this objection also has no force and must fail.

There is some force in the objection that the lower court should not have passed this order without issuing a notice to the appellant; but the appellant has not shown us that this procedure has in any way prejudiced him. It is always desirable that, when such applications are made after long intervals from the dates of previous orders, those interested should be heard before any orders are passed by courts; but, when a notice is not required by the Code, the omission does not *per se* vitiate the order and render it liable to be upset.

Thus the three minor objections are disposed of, and the most

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GUNGARAM v. RUDRANA.

important one which is the first ground of appeal remains, that the application for the granting of the sale-certificate is barred by the law of limitation.

The appellant relies upon Article 178 of the Second Schedule of the Limitation Act, and the opinion of the British High Courts seems to be that that article does not apply to such applications. See *Kylasa Goundan* v. *Ramasami Ayyan*(1); *Vithal Janardan* v. *Vithojirav Putlajirav*(2) and *Darbo* v. *Kesho Rai*(3). But it has been otherwise held by this court, and the first decision on the point is *Gaddappah* v. *Gungappah*(4). The ruling in that case is that an application by an auction purchaser is a condition precedent to the court granting a sale-certificate, and the time within which such an application should be made is limited, by Article 178 of the Limitation Act, to three years from the date when the right to make such application accrued, that is, the date on which the sale is confirmed.

This was followed by the case of *Aravindama* v. *Alamalama*(5) wherein Ramachendra Iyer, J., stated the law in the following words:—

"It is true that the court ought to have confirmed the sale, inasmuch as no application was made to set it aside. But if the court failed to perform its duty the auction purchaser ought to have moved it according to the provisions of the Code of Civil Procedure. No special period of limitation being provided for an application of this kind, we must hold that it is governed by Article 178 of the Second Schedule of the Limitation Act."

It may be observed that this ruling is not strictly applicable to the case before us, as it refers to the period prescribed for an application to confirm the sale; whereas the application now under appeal is one for the grant of a sale-certificate simply, the confirmation of the sale having been effected by the court *proprio motu*.

Abdul Nabi v. *The Hindu Bank*(6) was also cited, which is a full bench decision of this court. I am not sure that this decision applies to the present case, as I find that the application then made was also one for confirmation of sale, as well as for grant of a sale-certificate. The decision arrived at by the learned Chief Judge was in accordance with the two previous decisions already quoted, and the effect of all the rulings is that, both for an application for the confirmation of sale as also for an application for the grant of a sale-certificate, the period of three years is applicable.

(1) I. L. R. 4 Mad., 172.
(2) I. L. R. 6 Bom., 586.
(3) I. L. R. 9 All., 364.
(4) 7 M. L. R., 204.
(5) 9 M. L. R., 302.
(6) 12 M. L. R., 286.

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GANGARAJU v. RUDRANA.

The starting point in the case of one being perhaps the date of sale, and in the other its confirmation.

In the case before us, there was no application for confirmation and as observed by the Munsiff, that for sale-certificate must be counted from the date of the confirmation of the sale. It is admittedly within three years and therefore the objection set up by the appellant on this ground must fail.

Although the learned advocate for the appellant has not taken the objection specifically, yet the full bench judgment opens a question as to whether the Munsiff was right in confirming the sale without any application for it. The question was not raised before the full bench, and in the case *Aravindama* v. *Alamalama*(1) such a power seems to have been recognized to exist by this court. But in the course of the full bench judgment the Chief Judge, Mr. Plumer, held that the presentation of an application to the court for an order confirming a sale was a condition precedent to the court's confirming the sale. No reasons have been assigned for this proposition, nor has any authority been quoted in support of it. The question was incidentally raised and to what extent this dictum is binding deserves consideration. Viewed and construed in the light of the remarks made by Ramachendra Iyer, J., in *Aravindama* v. *Alamalama*(1) his concurrence does not, it may be taken, go beyond the ruling in that case, and the other member of the bench, who is the distinguished judge now presiding over this court, went no further than saying that, in his opinion, an application for confirmation should be made within three years under Article 178. I feel, under these circumstances, that I am free to regard the above dictum as being the expression of the opinion of a single judge of this court and such as, it seems to me, that I may give my reasons for respectfully dissenting from that opinion.

The case of *Basapa* v. *Marya*(2) does not go beyond laying down that, where there is an application, it ought to be made within three years. It is certainly no authority for saying that an application is a condition precedent, or in other words that till there is such an application, the court will be under a disability and not have jurisdiction to pass an order confirming the sale under section 312 of the Code of Civil Procedure. Such a proposition would be directly opposed to the express terms of that section. The correct interpretation seems to me to be that put upon it by Ramachendra Iyer, J. that the court ought to confirm the sale, if there is no application objecting to it or if such object-

(1) 9 M. L. R., 302. (2) I. L. R. 8 Bom., 433.

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GANGARAM v. RUDRANA.

ion has been rejected; and if the court neglects to do its work, thereby necessitating the party to move the court to do what it was bound by the law to do, but what it has not done, such an application should be made within three years. I am aware that such a distinction may sometimes lead to anomalies inasmuch as a court may do of its own motion what it may not do when applied to by a party. But a statute ought to be constructed beneficially so that mischief may be suppressed and remedy advanced, and I think it highly inexpedient to import into the Code of Civil Procedure a disability which the legislature has not imposed in express terms on the jurisdiction of courts in such matters.

This takes me to a consideration of the analogy which Plumer, C. J., has sought to establish between this section and s. 319 of the Code. The learned judge argues that, because no application is mentioned in s. 319 and yet it has been held that an application under that section should be made within three years, therefore there should be an application under s. 312. This reasoning appears to me to be not sound. Both ss. 318 and 319 declare the mode of delivering immovable property. The former section refers to property in the occupancy of a tenant. Both the sections must in my opinion be read together as laying down rules applicable to one subject, and the words "on application by the purchaser" must be construed to govern both sections. It seems to me that an application is as necessary when proceeding under s. 319 as it is under 318. The analogy attempted to be drawn is faulty, because there are no such words in s. 312.

Again in s. 230, it will be seen that, when the holder of a decree desires to enforce it, he shall apply to the court. Under s. 245, the court shall order execution of the decree according to the nature of the application, which ordinarily extends to the sale and its confirmation. No further applications are contemplated; when they are, the law expressly provides for them (*vide* ss. 259 and 260). To interpret the Code consistently, it seems to me that an application is not deemed a condition precedent wherever an application is not mentioned. Wherever it is wanted, the Code specially mentions it. In this view of the law, I hold that an application is not a condition precedent to the court confirming a sale under s. 312, and in the case before us, the Munsiff was perfectly justified in proceeding *proprio motu* to confirm the sale. His order confirming the sale is not invalid.

It is difficult to see why the granting of a sale-certificate should not be regarded as a ministerial act. The confirmation of sale is no doubt a judicial order, but the Bombay decision already

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quoted refers to a sale-certificate and not to a confirmation of sale. In the case of *Shamavadhani* v. *Chicka*,(1) the same learned Judge, Plumer, C. J., held that the certificate granted by the Deputy Commissioner under the Revenue Rules for property purchased at a revenue sale is merely evidence of title and may be granted at any time subsequent to confirmation of sale. The words used in s. 316 of the Code of Civil Procedure are nearly the same. Why the two certificates should be viewed in different lights requires explanation.

At all events, as the grant of the certificate in this case was within three years from the date of confirmation, the application even under Article 178 of the Second Schedule of the Limitation Act is not barred.

The appeal must therefore be dismissed with costs.

KRISHNA MURTI, J.—Since writing the above, the case was again argued, as it was represented that Rudrana's right in the property had been sold to another person and that therefore he had no subsisting right, to evidence which a certificate could be granted. It was however found that the right had not been conveyed to another.

It was contended that the application for grant of a certificate necessarily involves an application for the confirmation of sale and must therefore be regarded in that light. This is at the most a strained view of the case and is not in furtherance of substantial justice, to grant which, the Munsiff has rightly construed the law.

I adhere to the opinion already expressed, that this appeal must be dismissed.

THUMBOO CHETTY, C. J.—I concur in the conclusion arrived at by my learned colleague. The respondent Rudrana's application was merely for the grant of a certificate under section 316 of the Code of Civil Procedure. It contained no prayer for confirmation of the sale. But the court, finding that it had failed to pass an order of confirmation as required by s. 312, confirmed the sale at once and granted the respondent's application for a certificate. The decision of the division bench of this court in *Gaddappah* v. *Gungappah*(2) was overruled by the full bench in *Soobba Row* v. *Gopaliah*(3) and the order of the division bench in *Aravindama* v. *Alamalama*(4) was apparently passed without reference to the full bench ruling quoted above. The present case is analogous to that decided by the full bench. Following that decision, I hold that an application for a sale-certificate is one for the exercise of functions of a ministerial char-

(1) 6 M. L. R., 176. (2) 7 M. L. R., 204.
(3) 8 M. L. R., 292. (4) 9 M. L. R., 302.

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actor and requires no judicial order, and, as such, is not an application falling under Article 178, Second Schedule of the Limitation Act, and that the certificate may be granted whenever it is applied for. In a recent case, *Hira Ambaidas* v. *Tekchand Ambaidas*(1) the High Court of Bombay went so far as to hold that no formal application need be made for a certificate of sale, that it may be granted even on a verbal application, and that "in case any person chooses to apply in writing, the paper, as this is optional, need bear no stamp." The reason of this ruling is self-evident, as it is imperative on the courts to grant a certificate under s. 316. In the present case, the respondent simply asked for a certificate, which was ordered to be granted, and I fail to see what right the appellant has to complain of the granting of the certificate, much less to appeal to this court.

This case is clearly distinguishable from that of *Abdul Nabi* v. *The Hindu Bank*(2). There, there was a distinct prayer for confirmation of sale and also an application for the grant of a certificate. Where a court is asked to pass an order for confirmation of sale, the application would come under s. 312 of the Code of Civil Procedure and in connection with such application, necessitating the passing of a judicial order, the question of limitation has to be considered before disposing of the application; but the request for a certificate, provided the sale has been confirmed, has to be complied with as a matter of course under s. 316. In this case, the respondent advisedly refrained from moving the court to confirm the sale, because that was a duty imposed on the court by law and had to be performed without any motion or application by the purchaser. The respondent simply asked for a certificate, and we have no right to import words into his application so as to alter the nature of that application to his prejudice. The sale was confirmed by the court of its own accord, and the certificate, under the circumstances, could not be refused. As one of the judges who took part in that case, I wish to explain that I then deemed it necessary to confine my remarks only to so much of the application as related to the confirmation of sale, as the other question, whether an application for a certificate of sale was governed by Article 178 of Schedule II of the Limitation Act, was decided in the negative by the full bench in *Soobba Row* v. *Gopaliah*(3).

I agree to the dismissal of this appeal with costs.

Appeal dismissed with costs.

(1) I. L. R. 13 Bom., 670. (2) 12 M. L. R., 286.
(3) 8 M. L. R., 292.

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No. III (*see* page 255).

CHICKAVEERAY GOWDA (PLAINTIFF) *v.* HOOCHAVEERAPA AND ANOTHER (DEFENDANTS).*

1884 *October* 6.

Reference in appealable case—Court not competent to refer.

The Chief Court (PLUMER, C. J. and THUMBOO CHETTY, J.) pronounced the following order:—

This being an appealable case, the Munsiff was not competent to make this reference. He should dispose of the case according to his own view of the law and procedure laid down for the guidance of the courts.

Record returned.

* Civil Reference No. 6 of 1884 from O. S. No. 281 of 1883 of the Munsiff of Maddagiri.

No. IV (*see* page 255).

VENKATA SUBBA BHUT (PLAINTIFF) *v.* THUMIA AND OTHERS (DEFENDANTS).*

1885 *March* 16.

Reference in appealable case—Court not competent to refer.

The Chief Court (PLUMER, C. J. and THUMBOO CHETTY, J.) pronounced the following order:—

We decline to give any opinion, because, if we do, we assume it to be a case in which no appeal would lie. The Munsiff must decide the case himself.

Record returned.

* Civil Reference No. 2 of 1885 from execution case No. 1884 of the Munsiff of Sagar.

No. V (*see* page 299).

THE GOVERNMENT *v.* THIMMA BOYEE AND OTHERS.*

1883 *Feb.* 29.

Penal Code (Act XLV of 1860), s. 504—Abuse—Breach of peace—Intention.

The following order was passed by the Chief Court (PLUMER, C.J.):—

I have read the record in this case and am of opinion that the conviction is bad in law.

The accused were put on their trial on a charge under s. 504 I. P. C. The charge is defective in a very material point. It does not set out that the accused insulted and provoked the complainant intend-

* Criminal Revision No. 177 of 1883 of Criminal Appeal No. 7 of 1883 of the District Judge of Kadur.

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ing or knowing it to be likely that such provocation would cause her to break the peace or to commit any offence.

It is manifest, on the face of it, that when the accused used vulgar words of abuse to the complainant they could not have intended or known it to be likely that such abuse would cause complainant to break the peace; nothing indeed was more unlikely than that the complainant, a woman, should break the peace by assaulting these three wodders. It was clearly not the intention of the accused to cause the complainant to commit any offence; their intention manifestly was to cause the complainant to give them raggi which they alleged was due to them.

I quash the conviction of the accused and direct that the fine if levied be repaid to them.

Conviction quashed.

1885
Nov. 14.

No. VI (*see page* 299).

THE GOVERNMENT *v.* HAZRAM BEE.*

Penal Code (Act XLV of 1860), s. 504—Abuse—Breach of peace—Intention—Mere use of words of vulgar abuse not punishable.

The Chief Court (PLUMER, C. J. and RAMACHENDRA IYER, J.) passed the following order :—

We are of opinion that the conviction under s. 504 of the Indian Penal Code is bad in law; the Magistrate does not find that there was any intention to cause a breach of the peace, and the mere use of words of vulgar abuse is not punishable. We quash the conviction and direct the fine to be repaid to the accused.

Conviction quashed.

* Criminal Revision No. 172 of 1885 of Summary Trial No. 78/434 of 1885 of Mr. Mahamed Ali, Town Magistrate, Bangalore.

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ADVANCES—*Breach of Contract Act* (*XIII of* 1859) *s.* 2—*Imprisonment in default—Costs.*] An accused under the Breach of Contract Act (XIII of 1859) was ordered to repay advances and costs or in default to suffer rigorous imprisonment. *Held,* that it was illegal to direct imprisonment in anticipation of non-compliance by the accused with an order to carry out his contract or repay the advance. Sentence of imprisonment should only be passed in the event of the accused not complying with such order. The Act does not authorise the inclusion of complainant's costs in the sum which the accused is to repay and to direct his imprisonment until they are paid. Complainant's costs are recoverable under other enactments.—MANJIA v. KUKANA ... 473

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vague, it seemed only to imply that the proceedings were to commence in a week, as they did: but even if the time for making the award were by the deed limited to a week, the subsequent conduct of the parties in not objecting and in attending meetings of the arbitrators after the week had expired, showed that they gave their implied consent to the extension of the period. *Further,* the deed of submission simply empowered the arbitrators to make a division of all the property according to Mahomedan law. It in no way restricted the mode of effecting such division. The Mahomedan law merely declares the shares of heirs but is silent as to the method to be adopted in making a division. The mode adopted by the arbitrators was a common-sense one and not prohibited by the deed of submission. The parties did not wish the property to pass out of the family and the fact that each intimated to the arbitrators the highest amount for which he would purchase the several buildings and did not object to the arbitrators' method of estimating their value showed that the mode of division adopted by the latter was not unforeseen or unauthorised. The arbitrators therefore acted within their authority in dividing the property as they did. *Further,* the award of the arbitrators was final. The proceedings up to that point were conducted regularly and carefully and the decision of the arbitrators was unanimous. Their award was reduced to writing, signed by all and complete in itself, so far as regarded its legal operation. It left no points undecided. *Further,* the subsequent proceedings of the arbitrators, after a doubt as to the legality of the award had for some reason or other made its way into their minds, were nugatory, for as soon as the award was made the authority of the arbitrators was at an end. They were not at liberty to exercise a fresh judgment in the case and alter the award in any particular. They were so entirely *functi officio* that they could not even have corrected a manifest error in the calculation of figures. *Therefore,* the award being final and valid, a suit independent of it was not maintainable: only one to enforce it could be brought, and the present suit must fail. *Further,* the award having directed the money due to *B*, the plaintiff, to be paid within exactly one month, and failure in payment within the time having been made, the rest of the award took effect and the bungalow vested in the plaintiff subject to payment by her of the other sum mentioned. This was the legal effect of the award, which it was not open to the arbitrators or the parties to vary. The purchasers did not, it is true, purchase for an inadequate sum, but knowing, as they did, that the plaintiff had an interest in it, they did not take proper measures to obtain her consent. They could not therefore be said to have acted *bonâ fide* and were not protected by ss. 38 and 53 of the Transfer of Property Act. The sale was therefore invalid and must be set aside. Each party to bear their own costs throughout, inasmuch as the plaintiff brought the suit ignoring a valid award and as the vendor of the property acted in excess of his rights under the award and the purchasers took it with full knowledge there were others interested in it without obtaining their sanction. *Held* (*on review*) that the plaintiff cannot be granted greater relief than the plaint asked for nor more than the suit as framed would entitle her to. The award being contingent in its effect, the rights of the parties depended upon the fulfilment or otherwise of the conditions imposed by it, a question resting on evidence and best determined in a separate suit. The decree was therefore modified as regards the setting aside of the sale.—HAZARAM BI *v.* KOOLSUM BI 381

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BAILMENT—*Contract Act* (*IX of* 1872), *ss.* 148, 182 *and* 212—*Agency—Wrongful detention or conversion—Damages—Measure of.*] *A* deposited three jewels with *B*, a bank director, with instructions to sell them and apply the proceeds towards discharge of a debt due by him to the bank. *B* failed to fulfil his promise and *A* had to borrow elsewhere to repay the bank. *B* evinced no intention whatever of fulfilling his promise but from the moment he got possession of the jewels converted them to his own use; further, he knew all the facts and that unnecessary delay on his part would cause needless loss to *A*. It was in his power to have relieved *A* from such loss, of which he was aware, and he misconducted himself by not only not carrying out *A's* directions but by denying *A's* claim. *A* sued for value of jewels, interest on money borrowed and damages. *Held*, that the above facts constituted more than a simple bailment under the Contract Act s. 148, whereby the bailor could only claim the value of the thing bailed; but they showed that *B* was liable either as a wrong-doer or as a negligent agent under the Contract Act ss. 182 and 212; and in either case would be liable to *A* for special and consequential damage over and above the value of the jewels. Interest from the date of deposit might have been awarded to *A*.—HANUMANTHA ROW *v.* RAMACHENDRA ROW... 36

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CIRCUMSTANCES WHEN LOWER APPELLATE JUDGMENT IS TO BE PREFERRED TO THAT OF COURT OF FIRST INSTANCE—*Code of Civil Procedure* (*Act XIV of* 1882) *s.* 373—*Withdrawal with liberty to bring fresh suit—Grounds for—Objects of section.*] On the facts the Chief Court agreed with the lower appellate court and dismissed the suit: that court having closely analysed and discussed the evidence and given cogent reasons for its conclusions. *Held*, that the plaintiff having shown in his first plaint, in which no formal defect was observable, that he knew what he was about and made no mistake at all, and the right to a moiety of the property which he sought therein, being the only relief open to him, there were no grounds for permitting him to withdraw the suit with liberty to bring a fresh one. The object of s. 373 Civil Procedure Code is to give power to a court to help an innocent party who would suffer if he was not allowed an opportunity of rectifying a formal defect owing to which he would unjustly lose a suit or of correcting any other honest mistake of fact which he might have innocently made from insufficient information.—VEERAY GOWDA *v.* RUDRAYYA 30

CIVIL DISPUTE: *see* CODE OF CRIMINAL PROCEDURE 422

CIVIL LIABILITY OF AGENT FOR ACTS OF SUBORDINATE: *see* CODE OF CIVIL PROCEDURE 201

CIVIL SUIT: *see* REFUND OF COMPENSATION 474

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) SS. 5 AND 12 AND SCH. II, ART. 156: *see* LIMITATION ACT 353

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) S. 13: *see* RES JUDICATA ... 341

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) S. 34: *see* MAINTENANCE ... 361

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) S. 53, PROVISO: *see* SPECIFIC RELIEF ACT 368

CODE OF CIVIL PROCEDURE: *see* EXECUTION OF DECREE 455
see LOCAL INVESTIGATION 456

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) SS. 549 AND 592—*Pauper appellant—Security for costs—Duty of court admitting appeal—Reasonable time for defence—Negligence—Misconduct—Civil liability of agent for acts of subordinate—Limitation—Limitation Act* (*XV of 1877*) *Sch. II, Art. 90.*] A bank agent, having been convicted of criminal breach of trust was sued by the directors for the monies he had misappropriated, and a decree passed against him. He appealed and was held to be a pauper. He urged that the lower court failed to give due consideration to the fact of his imprisonment and consequent inability to produce evidence by the date of hearing, which was fixed unreasonably early, that the suit was barred by limitation and that he ought not to be held liable for several items many of which he alleged (but did not prove) were misappropriated by his subordinates. Application was made by the respondents that security for costs should be taken from the appellant, in answer to which he urged his poverty and that to demand security would in fact deny him the right of appeal. *Held*, that under the circumstances security for costs should not be taken, and that the case should be remanded to the District

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Court to hear the appellant's objections to the accounts found against him. *Further*, that the limitation applicable is that provided by the Limitation Act (XV of 1877) Sch. II, Art. 90, namely three years from the time when the neglect or misconduct becomes known to the plaintiff, and the suit is therefore not barred. *Also*, there is absolutely no evidence that any particular sums were made away with by others and it was the defendant's duty to see that the accounts were correct and to sign the daily cash balances; the defendant is therefore civilly responsible to the bank for sums misappropriated by him or by other officials through his negligence. *Per* KRISHNA MURTI, J.—As the appeal was made in *formâ pauperis*, it was incumbent on the court to satisfy itself before admitting the appeal, that the decree appealed against was erroneous or unjust. The judge would have acted in furtherance of justice, if instead of giving the defendant's advocate the unreasonably short period of four days to consult his client and produce evidence he had given him reasonable time for the purpose. The principles laid down by the High Courts of Madras and Bombay that the poverty of an appellant should be no ground for depriving him of the right to appeal, should guide the decision of this case as to security for costs.—VENKATA ROW *v.* THE BANGALORE PETTA MERCHANTS BANK 201

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) ss. 312, 588 AND 622—*Order setting aside sale, appeal from—Irregularity—Limitation—Limitation Act (XV of 1877) Sch. II, Art. 166.*] The Munsiff set aside an execution sale which had taken place within 30 days from the date of proclamation, upon the application of the decree-holder, which application was made more than thirty days after the sale. *Held*, that there is no appeal under the Code of Civil Procedure, s. 588, from an order setting aside a sale under the Code of Civil Procedure s. 312. *Further*, that the Munsiff was right inasmuch as thirty clear days had not elapsed between the date of proclamation and the date of sale, and there was no reason for the Chief Court to interfere under s. 622 of the Code of Civil Procedure.—HANUMANTHA RAO *v.* RUNGA RAO ... 241

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882), ss. 230, 245, 259, 260, 312, 316, 318, 319—*Limitation Act (XV of 1877), Sch. II, Art. 178—Confirmation of sale—Grant of certificate—Limitation for application for certificate—Absence of application to court for confirmation—Power of court to confirm proprio motu.*]—GANGARAM *v.* RUDRANA ... App. ii

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882), ss. 30, 34, 539—*Objection advanced for first time in second appeal—Scope and object of s. 30 of the Code of Civil Procedure—Right of President and Committee appointed by community to sue without joining all members of the community.*] An objection under *s.* 539 or *s.* 30 of the Code of Civil Procedure is too late when advanced for the first time in second appeal. An objection under *s.* 30 of the Code that there are others who have the same interest in the suit as the plaintiffs and that such persons have neither been added as plaintiffs nor represented by the plaintiffs on record with the leave of the court is an objection for want of parties and must be made before the first hearing. Section 30 of the Code of Civil Procedure is merely regulative and not constitutive. It indicates the procedure to be followed when it is intended to make the decision in a suit binding also on those who are not parties but have the same interest in it as the parties have. If such other persons are not represented with the leave of the court and in the manner prescribed by *s.* 30 then it must be seen whether the plain-

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tiffs in themselves are entitled to the relief they asked for. *Anandrav Bhikaji Phadka* v. *Shankar Daji Charya* (I. L. R. 7 Bom., 324) approved. The plaintiffs were the president and members of a committee appointed by the Devanga community with the sanction of the spiritual head, the Swami of the Ramachendrapur Mutt, for the purpose of settling all caste disputes and managing the affairs of the temple; and they sued for possession of the temple, which they alleged to belong to the community as a whole. *Held*, that the whole community could not manage the temple except through its representatives, the plaintiffs, who were therefore competent to sue for possession without joining with them all the members of the community whom they represent, as plaintiffs.—RAMASETTY MALLSETTY *v.* PUTTASETTY PUTTAPPASETTY 447

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882), s. 206—*Amendment of decree by lower court after appeal.*] After an appellate decree for possession of immoveable property had been confirmed on second appeal, the lower appellate court amended it by inserting boundaries. *Held*, that the effect of the amendment was not to alter the ultimate decree or to affect property other than that actually claimed and decreed. It was therefore not contrary to law. A court has power, under the Code of Civil Procedure s. 206, to amend a decree by bringing it into conformity with the judgment after it has been confirmed on appeal. *Ram Saran* v. *Persidhar Rai* (I. L. R. 10 All., 51) followed.—KENCHETY DODANA *v.* RAMA RAO 453

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) SS. 164, 364 AND 309: *see* CONFESSION 413

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) s. 185: *see* SANCTION TO PROSECUTE 476

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882), SS. 236, 237, 238—*Penal Code* (*Act XLV of* 1860), *ss.* 352 & 451—*Alteration of finding—Enhancement of sentence—New trial.*] A conviction under s. 352 of the Penal Code with sentence of fine was altered by the District Magistrate to a conviction under s. 451 of the Penal Code and a nominal sentence of imprisonment (one minute) was super-added. *Held* that the alteration amounted to enhancement of sentence and could not be upheld. Where the actual offence is more serious than the lower court has found but does not form a species of that offence such as is contemplated by ss. 236, 237 and 238 of the Code of Criminal Procedure, the proper procedure is to order a new trial. The offences under s. 352 and s. 451 of the Penal Code are altogether different; the former being a compoundable summons case and the latter a non-compoundable warrant case.—GOVERNMENT *v.* LINGANA 281

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882), SS. 145 AND 191—*Complaint—Grounds for interference by magistrate to prevent breach of the peace—Civil dispute.*] *K* alleged that *P* wrongfully attempted to take possession of shops attached to the Lubbay Mosque and was preventing the collection of rents by *K*; that in consequence there was every likelihood of a breach of the peace between the two factions of the Lubbay community of which *K* and *P* were the respective heads; and therefore the magistrate was asked to interfere and confirm *K's* possession under *s.* 145 of the Code of Criminal Procedure. The magistrate refused to entertain *K's* application. *Held*, that an application under *s.* 145 of the Code of Criminal Procedure is not a complaint under *s.* 191 and the magistrate is not bound to dispose of it as if it were. Such an application only apprehends the commission of an offence while a complaint discloses the actual commission of an offence. *Further*, the magistrate should proceed under *s.* 145 of the

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Code of Criminal Procedure only when he is satisfied that a dispute likely to cause a breach of the peace exists. The suggested apprehension of a breach of the peace must not be merely colorable and made to induce the magistrate to deal with matters properly cognizable by the courts. There being no present danger of a breach of the peace, the fact that such a breach is likely to occur at a future time does not justify a magistrate in making an order as to possession. The petitioner *K* would have his remedy in the civil court, if the tenants refuse to pay rent.—KOTAY MAHOMED HOOSAIN SAIB *v.* PACHA SAIB 422

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) SS. 144 AND 435—*Proceedings—Revision.*] *Held*, that the High Court has no power to interfere on revision with the order of a Magistrate under chapter XI (s. 144) of the Code of Criminal Procedure.—HAJI MAHOMED YACOOB *v.* KOTAY MAHOMED HOOSSAIN 426

COLLUSION: *see* LEASE 5

see LEASE 93

see MINOR 216

COMMENSALITY. PRESUMPTION ARISING FROM: *see* HINDU JOINT FAMILY ... 59

COMMENSALITY: *see* MAHOMEDAN LAW 442

COMPANIES ACT: *see* INDIAN COMPANIES ACT 428

COMPANIES ACT (X OF 1866)—*Unregistered Company—Authority of Secretary—Code of Civil Procedure (Act XIV of 1882), s.* 53 *(f)—Bonâ-fide mistake—Costs.*] The E. and A. Association of Mysore was sued through its Secretary for specific performance of a contract and to compel a conveyance. It appeared that the Association was not registered under the Indian Companies Act (No. X of 1866) which regulates companies in Mysore. *Held*, that the Association, being unincorporated, the defendant who is styled its Secretary, has no legal power to represent the members in his official capacity and a suit filed against him alone cannot be recognised as a suit against the Association. The plaint should therefore be returned for amendment under the Code of Civil Procedure s. 53 (*f*), and as there appeared to be a *bonâ-fide* mistake on the part of the plaintiff each party should bear his own costs.—POTGEITER *v.* PEDROZA 161

COMPANY: *see* LIMITED COMPANY 412

COMPANY, UNREGISTERED: *see* COMPANIES ACT 161

COMPANY, REGISTERED—*Liability of officers for money due by Company.*] The plaintiff being entitled to receive money from a registered Company sued the president and shroff alleging that they had taken the amount and misappropriated it. *Held*, that the plaintiff had no cause of action against the defendants. He could only sue the company. If the defendants had defrauded the Company, that was matter for settlement between it and them.—RAMA CHENDRIA *v.* RANGAPPA ... 211

COMPENSATION: *see* REFUND OF COMPENSATION 474

COMPENSATION UNDER LAND ACQUISITION ACT—*Jurisdiction of Provincial Small Cause Court.*] Where there were contending claims to land taken up for public purposes and for which compensation had been awarded, *Held*, that a suit by one claimant against another for declaration of title to the land and of right to receive the compensation awarded, was not cognizable by a Court of Small Causes.—ANDREWS *v.* ABDUL RAHMAN SAIB 409

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COMPLAINT: *see* CODE OF CRIMINAL PROCEDURE 422

COMPROMISE OF DECREE: *see* LOCAL INVESTIGATION 456

COMPULSION: *see* RECOVERY OF MONEY PAID UNDER PRESSURE 42

CONCLUSIVENESS OF DECLARATORY DECREE IN CRIMINAL COURT: *see* THEFT OF CROP 465

CONCURRENT FINDING OF LOWER COURTS—*Binding on appellate court—Construction of Survey Rules—Poot Kharab land.*] *Held* that, whether the lower appellate court rightly or wrongly construed the Survey Rules, the distinct and concurrent finding of both the lower courts on a question of fact is binding on the court of second appeal. At the same time, the court do not assent to the proposition that because appellant is holder of a portion of Survey No. 5, he is therefore by operation of the Rules entitled to trees standing on the bank of a pond the ground occupied by which and a temple has been deducted from arable area and classed as *Kharab.*—LUKSHMAY GOWDA *v.* NARAYANI 34

CONFESSION: *see* WITHDRAWN CONFESSION 460

CONFESSION—*Withdrawal—Corroboration—Evidence Act (I of 1872) ss. 25, 26, 27 and 80—Evidence of Magistrate who recorded confession—Code of Criminal Procedure (Act X of 1882) ss. 164, 364 and 309—Expression by Sessions Judge of opinion to assessors.*] The accused was charged with murder of a child by drowning in a well where the body was found. He made a confession before a magistrate which he withdrew in the Committing Magistrate's Court and the Sessions Court. The evidence of the magistrate who recorded the confession was taken in the Sessions Court. It was objected on behalf of the prisoner that this evidence was wrongly admitted, that there was no corroboration of the statement and that the Sessions Judge had wrongly obtruded his opinion on the assessors. *Held,* that, as the child's body and the well were discovered by independent means, the prisoner's subsequent admission to the police that he had thrown the child into the well was not admissible in evidence. *Also,* that the confession would be admissible under *s.* 80 of the Evidence Act. If the provisions of *s.* 164 or *s.* 364 of the Code of Criminal Procedure were not fully complied with, the evidence of the recording magistrate to prove the circumstances under which the prisoner was brought to him and the confession recorded would be necessary. In the present case such evidence seemed redundant. The magistrate moreover was not examined as to the contents of the document. His evidence therefore seemed unobjectionable. *Also,* that, as the prisoner withdrew his confession, it was necessary to see if there was reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statement. The dictum of Kernan, J., in *Queen-Empress v. Rangi* (I. L. R. 10 Mad., 295) followed. In the present case there being such corroboration, the conviction and sentence were upheld. *Also,* that the expression of his opinion by a Sessions Judge to assessors does not vitiate the proceedings, as the judge is not bound to conform to the opinion of the assessors and the prisoner has the right of appeal on facts.—QUEEN-EMPRESS *v.* MUNISAMY 413

CONFIRMATION: *see* EXECUTION SALE 233

CONFIRMATION OF SALE: *see* CODE OF CIVIL PROCEDURE ... App. ii

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CONSIDERATION—*Ascertainment of real consideration—Illegality of consideration—Contract Act (IX of 1872), s. 23—Transfer of an office—Shanbog.*] The registered shanbog of a village agreed in writing to transfer his office if the transferee would pay off a certain debt due by the shanbog and give him a fixed yearly maintenance. By a bond of the same date the transferee undertook with the shanbog's creditor to discharge such debt. The transferee subsequently sued for delivery up and cancelment of his bond as being void and on an illegal consideration. *Held* (by the Division Bench) that although the agreement and the bond were executed as two separate instruments it must be inferred from the conduct of the parties that they intended to treat them as substantially forming one transaction; and that looking at the substance and not the form of the transaction, the true consideration was the contemplated transfer of the office of shanbog. *Held* (by the Full Bench, Thumboo Chetty, C.J. and Krishna Murti, J., Ramachendra Iyer, J. *dissenting*) that the consideration of the bond is illegal. *Per* Ramachendra Iyer, J.—The agreement partakes more of the nature of a family arrangement than a bare sale of an office and is not void.—VENKATA RAYAPPA *v* SRIRAMA NAGIA 163

CONSIDERATION, FAILURE OF: *see* SALE 48

CONSIDERATION: *see* MUTT 84

CONSPIRACY: *see* PENAL CODE 303

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CONSTRUCTIVE POSSESSION: *see* SPECIFIC RELIEF ACT 368

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CONTRACT FOR SALE: *see* ARBITRATION 142

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COSTS, SECURITY FOR: *see* CODE OF CIVIL PROCEDURE 201

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COVENANT, ABSENCE OF IN DEED: *see* SALE 48

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DAMAGES : *see* BAILMENT 36
see EASEMENT 52
see MAHOMEDAN LAW 376
see POSSESSORY MORTGAGE 120
see SALE OF MORTGAGED PROPERTY 9

DAMAGES—*Costs of Criminal Prosecution—Trespass—Measure of damages—Evidence of quantum of loss.*] *Held* that, as ruled in *Anniammah* v. *Nanje Gowdah* (8 M. L. R., 171), the costs incurred in a criminal prosecution cannot be recovered as damages in a civil suit. The measure of damages in a case of trespass is the actual loss a man is put to, and the cost of a criminal prosecution does not fall within its legitimate scope. [See also *Mahomed Ali* v. *Bayama* (I. L. R. 14 Bom., 100) and *Fazul Imam* v. *Fazul Rasul* (I. L. R. 12 All., 126).] *Held also*, that the evidence of the plaintiff being vague and discrepant, there is no precise information as to the number and value of his trees cut. The damages cannot be properly assessed owing to the plaintiff's failure to furnish evidence to prove the exact quantity of his loss.—RAMACHENDRA CHARRY *v.* MADHVA RAO ... 111

DAMAGES FOR TRESPASS, SUIT FOR :—*see* SMALL CAUSE COURT 259

DAMNUM ABSQUE INJURIA : *see* MAHOMEDAN LAW 376

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DECISION IN SUIT BINDING ON PARTIES ONLY OR ON THEIR REPRESENTATIVES : *see* RES JUDICATA 341

DECLARATORY DECREE : *see* THEFT OF CROP 465

DECLARATORY DECREE—*Further relief—Specific Relief Act* (*I of* 1877) *s.* 42—*Multiplicity of suits—Cause of action.*] Suit for declaration of right in a well and four cocoanut trees, of which the plaintiff claimed a one-sixth share only : and which were in the possession of the defendants. *Held*, that actual partition being impossible, the plaintiff could only ask for a declaration of his right, and not for further relief. The plaintiff should not be compelled to seek further relief for the purpose of avoiding multiplicity of suits, because he would have a fresh and independent cause of action whenever default might be made in payment or delivery, of produce on due date.—SUBBAYA *v.* CHICK NUNJAPPA 213

DECREE, DECLARATORY : *see* THEFT OF CROP 465

DECREE : *see* LOCAL INVESTIGATION 456

DECREE NOT MADE OUT TILL FIVE YEARS AFTER JUDGMENT : *see* LIMITATION ACT 353

DEFAMATION—*Jurisdiction—Extradition Treaty with the Nizam.*] A resident (subject of the Nizam) at Hyderabad, Deccan, was charged on complaint before the Magistrate, Civil and Military Station of Bangalore, with defamation. *Held*, that as the offence of defamation is not one of those for which extradition can be demanded of the offender from the Nizam's Government under the Extradition Treaty of the 25th May 1867, it would be useless to proceed with the charge in Bangalore.—VEERARAGHAVALU NAIDU *v.* MUSTAK HUSSAIN ... 427

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DISHONESTLY OBTAINING STOLEN PROPERTY—*Penal Code (Act XLV of* 1860) *s.* 411—*Whipping Act* (*VI of* 1864) *s.* 2—*Words of description—Enhancement of sentence -Code of Criminal Procedure* (*Act X of* 1882) *s.* 423 *and s.* 390—*Sentence of whipping altered to rigorous imprisonment.*] On appeal the District Magistrate altered a sentence of whipping for the offence of retaining stolen property under s. 411, Indian Penal Code, to one of rigorous imprisonment for one month, alleging as a reason that the prisoner was "not a juvenile, but a grown-up young man of twenty-three." *Held*, that the sentence of whipping was perfectly legal, as the Whipping Act authorises the punishment under it of adults as well as of juveniles and the case did not fall under any of the exceptions mentioned in the Code of Criminal Procedure, s. 390. *Further*, that the alteration of sentence to imprisonment from whipping is practically an enhancement, forbidden by the Code of Criminal Procedure, s. 423, and therefore illegal. *The Queen* v. *Banda Ali* (6 B. L. R. App., 96) followed. *Semble*, the words used in all the clauses of s. 2 of the Whipping Act (VI of 1864) are merely words of description and the offences punishable are those named in the sections of the Penal Code specified: therefore the offence of "retaining" stolen property can be punished by whipping although the Whipping Act s. 2 (7) specifies only "receiving."—LINGAPAYA *v.* WADDAR HANUMA... 269

DISMISSAL OF APPEAL FOR DEFAULT IN GIVING SECURITY—*Security given after time—Power of court to extend time—Code of Civil Procedure* (*Act XIV of* 1882), *s.* 549—*Proportionate costs.*] The suit was for damages against defendants for having trespassed and cut fuel on lands leased to the plaintiff. Defendant No. 1 was agent of the owners of the lands and as such had leased first to defendant No. 3 and then, on default by the latter of payment of his rent, to the plaintiff. Defendant No. 2 was a fuel contractor into whose possession some fuel from the lands in question had passed through his sub-contractor, defendant No. 3. Defendant No. 3 had after default and forfeiture cut fuel on the lands. The suit was dismissed as against defendant No. 1, he being only an agent and having done all he contracted to do: also as against defendant No. 2, it not being shown that he had done any of the acts charged but had merely made an agreement with defendant No. 3 for the supply of fuel. A decree was passed against defendant No. 3 for part of the claim and the plaintiff was ordered to pay costs on the balance to this defendant. On appeal to the Chief Court by defendant No. 3, security for costs was ordered; but was not given by the appellant until a week after the date fixed, when he signed a bond before the Munsiff. A cross-objection as to costs was filed by the plaintiff, but although he knew previously that security had been taken after time, he raised no objection until the appeal came on for hearing, when he moved its rejection under s. 549 of the Code of Civil Procedure. *Held, per* THUMBO CHETTY, C. J.—that the conduct of the respondent amounted to a waiver and that the appeal should be heard. *Per* KRISHNA MURTI, J.—the appeal must be rejected under s. 549 of the Code of Civil Procedure. *Held*, on reference, by the FULL BENCH (THUMBOO CHETTY, C. J., RAMECHENDRA IYER and KRISHNA MURTI, JJ.), that the appeal should be heard, as the Court has power to extend the time and its order was substantially complied with. *Per*

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THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.—Security having been already taken it would be an idle formality to take a fresh bond. The security already furnished should be accepted. *Per* KRISHNA MURTI, J.—I still entertain doubts as to the validity of the moochalika taken by the Munsiff after expiry of the time fixed; and consider it advisable to renew the security in proper form. *Held*, on the merits, by the DIVISION BENCH (THUMBOO CHETTY, C. J., and KRISHNA MURTI, J.) that the Munsiff's findings of fact are correct and that the appellant having failed to make out his case, it should be and was rightly dismissed. *Further*, the Munsiff has not erred in his apportionment of costs, which is in accordance with the result of the suit. The plaintiff does not take exception to the amount of damages awarded and it follows that he had no justification in valuing the relief at an unnecessary large sum.—PUTANNA *v.* CHUTHUR SING 178

DISPOSAL OF CLAIMS: *see* REFUND OF COMPENSATION 474

DOCUMENTS IN NAME OR POSSESSION OF ELDER BROTHER: *see* HINDU JOINT FAMILY 59

DOCUMENTARY EVIDENCE PREFERABLE TO ORAL TESTIMONY—*Hindu law—Power of father to bind joint family property—Liability of son to pay father's debts—Costs.*] *Held*, that where a letter admitted by the plaintiff is inconsistent with the oral testimony adduced by him and no explanation of such inconsistency is offered, the document is to be accepted in preference to the oral evidence. *Also*, that a father cannot under Hindu law bind the person of his son by a contract, though he may bind the joint family property. A decree against the sons as well as the father is therefore incorrect, as a son is not liable to pay his father's debts if he has not inherited any property from him; and his liability in any case is limited to the value of the property inherited by him. The decree against the sons personally was therefore set aside but there being nothing to rebut the plaintiff's case that the debts were contracted for the benefit of the family, the whole of the family property was made liable for the debt. The appellants, having substantially succeeded, were allowed costs in appeal on the amount decreed: but to pay costs on the same amount in the lower court.—VENKAPPAIYA *v.* VISVESVARAIYA 196

DOUBT: *see* FALSUS IN UNO, FALSUS IN OMNIBUS 284

DOUBT BY REFERRING COURT: *see* GENERAL STAMP ACT 253

DUTY, AMOUNT OF: *see* GENERAL STAMP ACT 253

DUTY OF COURT ADMITTING APPEAL: *see* CIVIL PROCEDURE CODE ... 201

E

EASEMENT—*Light—Damages—Joint right in property—Adverse possession.*] The plaintiff as joint owner with the defendants of a dwelling house comprising their two tenements, sued to compel the defendants to allow him access to certain parts of the premises enjoyed by the owners of the house in common and his right of way to which the defendants obstructed; also for damages. He further sought to compel removal of a wall which, though built on the defendants' property, he alleged diminished the access of light to his tenement so as to prevent his continuing his business of a weaver. *Held*, that the right claimed by the plaintiff is not an easement: he does not claim right as owner of a dominant tenement, but as having a joint interest with the defend-

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ants. A right in or to land is quite different from a burden imposed upon that land for the benefit of other land. *Held further*, that the ownership being clear, the question is whether there is evidence of long continued hostile possession so as to extinguish the plaintiff's right. Defendant No. 2 was in possession as mortgagee, but, whether he exercised all the powers which his mortgagors possessed or enjoyed the property in any other manner he considered most convenient, it cannot be said that defendant No. 1 acquired a right by adverse possession as against the mortgagors. *Held further*, that the defendants having by their wrongful act prevented the plaintiff from exercising his right, they are rightly liable in damages. *Held further*, that the plaintiff having grounded his action in respect of the wall in the *angala*, not upon the fact that the latter was common to both parties and therefore one alone could not erect a wall without the consent of the other, but that the erection of the wall diminished the supply of light to his portion of the house, the reasons given by the Munsiff are sound for disallowing the claim, upon the ruling in *K. Koosama and others* v. *T. Srinivasiengar* (6 M. L. R., 104), which held that the deprivation must be substantial in order to confer a right of suit.—CHICKA GUNGIAH *v.* GURUPATHAPPA 52

EJECTMENT: *see* HINDU JOINT FAMILY 59

ENFORCEMENT OF ORDER FOR REFUND: *see* REFUND OF COMPENSATION ... 474

ENGINE-DRIVER LEAVING HIS POST: *see* RAILWAY ACT 275

ENHANCEMENT OF SENTENCE: *see* DISHONESTLY RETAINING STOLEN PROPERTY.. 269

see CRIMINAL PROCEDURE CODE 281

ENLARGEMENT OF TIME BY IMPLIED CONSENT: *see* ARBITRATION... ... 381

ESTOPPEL: *see* INCHOATE AGREEMENT 225

EUROPEAN BRITISH SUBJECT—*High Court—Jurisdiction.*] The Judicial Commissioner of Coorg has no criminal jurisdiction over European British Subjects. The Madras High Court exercises original and appellate criminal jurisdiction in such cases in Coorg.—THAMANA *v.* SULLIVAN... 477

EVIDENCE: *see* LIMITATION 97

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EVIDENCE, ADMISSION OF ORAL TO PROVE TENANCY: *see* LEASE 77

EVIDENCE OF MAGISTRATE WHO RECORDED CONFESSION: *see* CONFESSION ... 413

EVIDENCE OF QUANTUM OF LOSS: *see* DAMAGES 111

EVIDENCE OF TITLE: *see* REGISTRATION OF HOUSE IN NAME OF MEMBER OF UNDIVIDED FAMILY 135

EXCISE ACT (XXII OF 1881) ss. 35 AND 3—*Fermented liquor—Poola conjee (boiled rice).*] Where a person was convicted under s. 35 of the Excise Act for having in his possession *poola conjee* or boiled rice, *Held* that, as such a preparation does not come under the definition of fermented liquor as given in s. 3 of the Act, the conviction was wrong.—QUEEN-EMPRESS *v.* KEREYABADAGARA MUDIA 468

EXCLUSION OF JURISDICTION OF CIVIL COURTS: *see* LAND REVENUE CODE ... 257

EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE: *see* PARTNERSHIP ... 405

EXCLUSIVE RIGHT: *see* HINDU JOINT FAMILY 59

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EXECUTION OF DECREE—*Code of Civil Procedure (XIV of 1882), ss. 373 and 647—Limitation Act (XV of 1877) Sch. II, Art. 179 cl. 4—Act VI of 1892 (An Act to amend the Indian Limitation Act 1877, &c.).*] Where applications for execution made on the 12th August 1886 and 5th June 1889 were struck off for default of appearance, a subsequent application made on the 17th May 1892 was *held* not to be barred by limitation or under the Code of Civil Procedure s. 373. *Radha Charan* v. *Man Singh* (I. L. R. 12 All., 392) disapproved. Rulings of other High Courts *contra* followed, in accordance with Act VI of 1892. – KRISHNA RAO *v.* ARRE KARIBASHETTY 455

EXECUTION-SALE—*Code of Civil Procedure (Act XIV of 1882), s. 312—Irregularity—Suit to set aside sale.*] The suit was to set aside an execution sale on the ground of the sale notice not having been duly published. The plaintiffs were the judgment-debtors. Defendant No. 2 was the judgment-creditor; defendant No. 3 was the purchaser. *Held,* that the Code of Civil Procedure s. 312 bars a regular suit, after confirmation, to set aside an execution sale on the ground of irregularity in publishing or conducting it. *Held further,* that the mere omission to beat the drum and to proclaim the sale by tom-tom is not such irregularity as can be urged as a ground for setting aside the sale. The plaintiffs being proved to have been aware of the date of sale could have advised intending purchasers: and there was neither fraud nor want of notice.—HONNIAH *v.* CHICKANNA 117

EXECUTION-SALE—*Setting-aside—Confirmation—Irregularities—Payment of decree by judgment-debtor after sale—Code of Civil Procedure (Act XIV of 1882) s. 316.*] The court was petitioned by the judgment-debtor to set aside an execution sale on the ground of certain irregularities, and was also applied to by the auction-purchasers, who were also the decree-holders, for confirmation; but refused both appllications. Leave was then granted to the judgment-debtor on a subsequent application by him to pay the amount of the decrees into court. *Held,* on appeal by the auction-purchasers, that there being no irregularities, such as would justify the refusal of confirmation of the sales they must be confirmed and the court has no power after sale to accept the amount of decree from the judgment-debtor and cancel a sale or refuse to confirm it.—SESHAYA *v.* KOMARIA 233

EXPRESSION BY SESSIONS JUDGE OF OPINION TO ASSESSORS: *see* CONFESSION... 413

EXTEND TIME, POWER OF COURT TO: *see* DISMISSAL OF APPEAL FOR DEFAULT IN GIVING SECURITY 178

EXTENSION OF TIME FOR PAYMENT OF DECREE AMOUNT: *see* LOCAL INVESTIGATION 456

EXTRADITION TREATY WITH THE NIZAM: *see* DEFAMATION 427

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FAILURE BY PLAINTIFF TO PROVE HIS ALLEGATIONS: *see* LEASE 77

FALSE EVIDENCE, PROSECUTION FOR GIVING: *see* APPROVER 334

FALSUS IN UNO, FALSUS IN OMNIBUS—*Proof—Preponderance of evidence—Doubt—Accused entitled to benefit of reasonable doubt.*] The accused were charged with wrongful confinement and extortion. The magistrate disbelieved the evidence as to extortion, but convicted on the charge of wrongful confinement. *Held,* by the Full Bench (KRISHNA MURTI, J. *dissenting*), that the case exhibiting a reasonable doubt, the

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accused should receive the benefit of it and be acquitted. *Per* THUMBOO CHETTY, C. J.—Neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient for a verdict of condemnation, unless it generates full belief of the fact to the exclusion of all reasonable doubt. Although the maxim *Falsus in uno, falsus in omnibus* is not of general application and inapplicable where the misrepresentation of a witness has resulted from mistake or infirmity and not from design and his honesty remains otherwise unimpeached, yet it has full force where, as in the present case, the narrative as to robbery is shown by the magistrate to have been made with deliberate perjury and from a sinister motive and the alleged circumstances are so related and connected with those of the wrongful confinement that little or no reliance can be placed on the statements of the witnesses as to the latter, which is said to have formed part of the same series of acts as the robbery. *Per* KRISHNA MURTI, J.—The evidence has been properly appreciated by the lower court and the conviction must be upheld. It is not correct to argue that because a part of the case was disbelieved the rest also should be rejected as false. The punishment is inadequate. but cannot be interfered with by the court sitting in appeal. GOVERNMENT *v.* NANJA 284

FAMILY-HOUSE, RIGHT TO DWELL IN: *see* REGISTRATION OF HOUSE IN NAME OF MEMBER OF UNDIVIDED FAMILY 135

FERMENTED LIQUOR: *see* EXCISE ACT 468

FOREST RULES: *see* PENAL CODE 278

FRAUD: *see* MINOR 217

see RECOVERY OF LAND 101

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FRAUDULENT OR DISHONEST INTENTION: *see* ADVANCES 469

FREE AGENCY: *see* RECOVERY OF MONEY PAID UNDER PRESSURE 42

FURTHER RELIEF: *see* DECLARATORY DECREE 213

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GENERAL STAMP ACT (I of 1879), ss. 34 & 49—*Reference in appealable case—Amount of duty—Nature of document—Doubt by referring court.*] Reference was made in an appealable case on the question whether a document was a promissory note or a bond. The referring court professed to make the reference under s. 49 of the General Stamp Act and expressed that it was made not on account of any doubt in the matter but in compliance with the request of the plaintiff's pleader. *Held*, that a judge is not competent to make a reference under the Stamp Act in an appealable case nor where he has admittedly no doubt on the question. *Further*, that s. 49 of the Stamp Act does not authorise a reference as to the nature of a document, but only as to the amount of stamp-duty leviable thereon.—VENKATA DASAPPA *v.* CHICKA NARAYANA REDDY 253

GOVERNMENT REQUIRED TO EXERCISE THE SAME DILIGENCE AS ANY OTHER PARTY: *see* APPEAL BY GOVERNMENT 293

GRANT OF RELIEF UNASKED FOR BY PLAINTIFF AND IN A MATTER HE IS NOT CONCERNED WITH: *see* RES JUDICATA 341

GRANT OF MORE RELIEF THAN SOUGHT FOR IN PLAINT: *see* ARBITRATION... 381

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GRANT OF TRUST PROPERTY: *see* MUTT 84

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GROUNDS FOR INTERFERENCE BY MAGISTRATE TO PREVENT BREACH OF THE PEACE: *see* CODE OF CRIMINAL PROCEDURE 422

GUARDIAN: *see* MINOR 217

GUILTY KNOWLEDGE: *see* MASTER AND SERVANT 268a

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HIGH COURT: *see* EUROPEAN BRITISH SUBJECT 477

HINDU JOINT FAMILY—*Commensality, presumptions arising from—Documents in name or possession of elder brother—Onus of proof—Ejectment—Exclusive right.*] Per *Thumboo Chetty, C. J.*—Where the fact is proved that for the past 30 or 40 years the plaintiff and defendant were living together in one house, the presumption is that they were living together as members of an undivided Hindu family. If they were joint in food for 30 or 40 years the legal presumption is that their earnings were also thrown into the joint or common stock to admit of the joint requirements of the family being met out of the joint earnings or savings. The plaintiff was the elder brother and, if he acquired any property, the presumption is that he did so by means of the joint savings or surplus funds common to both brothers. If, however, he alleges the property to be his own acquisition, the onus of proving his allegation lies on him. The mere fact that mortgage or sale deeds were in the plaintiff's name or *kundayem* receipts or other documents were taken in his name does not prove that his brother's rights to the property were excluded. There is nothing unusual in the plaintiff as elder brother being allowed to have title deeds &c., in his own name. That documents are in his possession, that he carried on transactions in his own name, that he recovered rents does not prove him to be sole owner. As elder brother, he was apparently regarded as manager or head of the family and as such was allowed to carry on transactions in his own name and keep documents, &c., in his own custody. No presumption adverse to the defendant can be raised from any of these circumstances. Where, as in the present case, it is proved that both brothers were living together at the time the sale-deed was executed; that they were under no necessity to raise a loan for buying the house, and that the plaintiff had no funds of his own, the legal presumption arises that the purchase was made out of funds belonging to both the brothers. Per *Krishna Murti, J.*—I do not think that, as between the parties to this appeal, the ordinary presumptions of Hindu law regarding the status of a joint Hindu family should be given effect to. The object of the suit as laid by the plaintiff is to eject his brother, the defendant, on the ground that he is a trespasser. On the evidence defendant No. 1 has proved joint possession of the house with the plaintiff. The plaintiff has not established his exclusive title to the house and the Munsiff is wrong in decreeing ejectment on this ground. *Chowdrappa* v. *Goorappa* (6 M. L. R., 141) and *Baldeo Das* v. *Sham Lall* (I. L. R. 1 All., 77) do not apply. *Kisto Chunder Kurmokar* v. *Rughoonath Kurmokar* (10 W. R., 329) has been erroneously applied by the Munsiff. In the present case the ground of contention is not joint family or joint living but joint acquisition. It is not

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sufficient for the plaintiff to produce the title deeds alone; he must prove how he obtained the money with which he bought the house. This he has failed to do; and the mere facts that the title deeds are in his name, that he repaired the house, and mortgaged the property do not help him. The evidence indicates that the defendant was living in the house in the assertion of his own right and not as dependent on his brother. *Per Curiam.*—The plaintiff, not having established an exclusive right to the house in dispute is not entitled to a decree for ejectment.—THIMMIA *v.* HIRINIAPPA 59

HINDU LAW: *see* DOCUMENTARY EVIDENCE PREFERABLE TO ORAL TESTIMONY... 196

see REGISTRATION OF HOUSE IN NAME OF MEMBER OF UNDIVIDED FAMILY 135

HINDU LAW—*Rights of widow—Rights of mother succeeding to son—Improper alienation—Waste.*] The estate taken by a mother succeeding to her son is like that taken by a widow from her husband, and the incidents are the same. In either case the mother or widow is entitled to the possession, use and enjoyment of the property without restriction and she has a power of disposition qualified by the principles of Hindu law. Without determining whether the plaintiff is next or immediate reversioner he is not entitled to a declaration that the alienations made by defendant No. 1 are invalid beyond her life-time unless he gives clear and cogent proof that they are contrary to the nature of her estate and unauthorized. *Held,* that as the present plaintiff has failed to prove any specific act of waste or improper alienation on the part of defendant No. 1 and no exceptional cause has been shown to question the propriety of any of the arrangements made by her for the benefit of her daughter or daughter-in-law or that she has been guilty of any infraction of Hindu law or committed any waste or made any improper alienations, the plaintiff is not entitled to bring this action for declaratory relief.—NARANAPPA *v.* LUKSHMI DEVAMMA 71

HINDU LAW—*Maintenance—Suit for possession of land—Res judicata.*] *Held,* the doctrine that a woman has a right to be maintained by her father's family if her husband's family is not in a position to maintain her, is not applicable to the present case, for it does not appear whether or no her husband's family is able to maintain the defendant. Her right of maintenance ought to be decided in a separate suit; it is no bar to the present suit which is brought by the plaintiffs to obtain possession.—THIMMAKKA *v.* EARIAH 115

HINDU LAW—*Joint property—Indications of joint interest—Devolution of separate property.*] *Held,* that residence with a brother under the circumstances appearing in the case, does not create in favour of the brother so residing a joint interest in property acquired by the brother with whom he resided. The property, being the separate property of the brother acquiring them, devolved at his death on his son exclusively.—BARMANA *v.* BASSAMA 396

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ILLEGALITY: *see* LEASE 93

ILLEGALITY OF CONSIDERATION: *see* CONSIDERATION... 163

IMPRISONMENT IN DEFAULT: *see* MILK DILUTED WITH WATER 470

INABILITY TO OBTAIN RECORD NO EXCUSE FOR BEING OUT OF TIME: *see* APPEAL BY GOVERNMENT 298

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INAMDAR : *see* PUNNAY LANDS 1

INCHOATE AGREEMENT—*Proposal not sanctioned by court—Registration—Estoppel—Code of Civil Procedure (Act XIV of 1882), s. 244—Right of appeal.*] A judgment-debtor presented a petition praying for leave to pay the decree by instalments, offering as security for the decreed amount lands standing in his wife's name; and she joined in the petition. The court varied the decree, with consent of the decree-holder, so far as to make it payable by instalments, but refused to make any property liable for the amount. *Held*, that the position of the decree-holder was not in any manner altered to his prejudice by the conduct of the wife, and the petition could not act as an estoppel against her when subsequently claiming the lands. The petition was only a proposal not accepted, an inchoate agreement and did not evidence any transfer of the wife's rights in favor of the decree-holder; if, however, it were to be treated as a document creating or conveying any right to the decree-holder, so as to enable him to execute his decree against the lands, it could not be received in evidence for want of registration. The Sub-judge remarked in his judgment that, by making the case fall under s. 244 of the Code of Civil Procedure he gave both parties a right of appeal. *Held*, that the case clearly fell under s. 244 of the Code of Civil Procedure, with right of appeal; and it is not in the power of any judge, by following a particular procedure, to abridge or extend, at his whim or fancy, the right of appeal.—DEVAJAMMANI *v.* SEETHAMMA 225

INCIDENTAL DECISION AS TO TITLE : *see* SMALL CAUSE COURT 259

INCONSISTENT PLEAS : *see* ARBITRATION 142

INDICATIONS OF JOINT INTEREST : *see* HINDU LAW 396

INDIAN COMPANIES ACT—*Notice to agent to produce books before Inspectors—Revision—Powers of criminal court to set aside acquittal.*] The agent of a limited company was called on by the Directors to produce the account books of the company before Inspectors appointed by it. He pleaded that he had received no written notice until after the date fixed for production. *Held*, that the Act does not make the issue of a notice in writing necessary before the prosecution of an agent for refusing to produce the books; a verbal demand is sufficient. *Also*, that although a court of criminal revision cannot convert a finding of acquittal into a conviction, it has power to revise and set aside an order of acquittal and direct a re-trial.—SADASIVA CHETTY *v.* SONDER DOSS BAVAJI 428

INCULPATORY ADMISSION : *see* WITHDRAWN CONFESSION 460

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JOINT FAMILY PROPERTY, POWER OF FATHER TO BIND: *see* DOCUMENTARY EVIDENCE PREFERABLE TO ORAL TESTIMONY 196

JOINT LIABILITY: *see* LEASE 93

JOINT PROPERTY: *see* HINDU LAW 396

JOINT RIGHT IN PROPERTY: *see* EASEMENT 52

JURISDICTION OF CIVIL COURTS—*Code of Civil Procedure (Act XIV of 1882) s. 11—Survey settlement, effect of.*] *Held* that a suit by Talaris, for an injunction to restrain the defendants from interfering with their enjoyment of the produce of certain tamarind trees is not prohibited by the Land Revenue Code or Rules, but is cognisable by a Civil Court under s. 11 of the Code of Civil Procedure. *Held also*, that, although the defendants are co-sharers of the Talari *huq* and in possession of a portion of the *inam* land, yet such portion having been distinct and with a distinct number before the Survey Settlement, that settlement did not give rise to any new rights or obligations not previously existing and did not make common property of everything within the boundaries of the new number. The right claimed by the plaintiffs having been proved to have existed in them exclusively they are entitled to the injunction sought for.—DODDA VENKATIGA *v.* B. VENKATIGA 208

JURISDICTION: *see* DEFAMATION 427

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JURISDICTION OF MAGISTRATE: *see* RAILWAY ACT 275

JURISDICTION OF PROVINCIAL SMALL CAUSE COURT: *see* COMPENSATION UNDER THE LAND ACQUISITION ACT 409

L

LAND REVENUE CODE, ss. 187, 221—*Possession—Revenue sale, rights of purchaser at—Putta-huq—Mesne profits—Code of Civil Procedure (XIV of 1882), s. 212—Revival of mortgage liability.*] The purchaser with possession at a revenue sale for arrears of revenue sued for a declaration of his right, for possession and for mesne profits. He was resisted chiefly on the ground that at the sale only a limited right (*putta-huq*) was disposed of and that he purchased no more than the right, title and interest of the then holder of such right. Defendant No. 2 also sought to set off an old mortgage debt on the score that it would revive, upon the land coming again into the ownership of the plaintiff. *Held* that s. 221 (C) of the Land Revenue Code is no bar to the entertainment of the present suit by the civil court. *Held further*, that it was the land itself that was sold and not simply the *putta-huq*, which is an unmeaning term. The full rights of the defaulter passed to the purchaser absolutely and no contention by the defendants to the contrary can be accepted. The mortgage rights set up by defendant No 2 were determined by his omission to pay up the arrears and prevent the sale; he raised no contention as to revival in the lower court and it is not now tenable. The question of mesne profits should be held over to the stage of

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execution under s. 212 of the Code of Civil Procedure. *Per* THUMBOO CHETTY, C. J.—The use of the expression *putta-huq*, whether authorisedly or unauthorisedly, does not affect the actual rights possessed by the defaulter as between himself and the Government. *Semble*.—The Mysore Land Revenue Code is no bar to the entertainment of a suit by a civil court under suitable circumstances, should complicated questions of title arise: as, for instance, should the revenue authorities give only symbolical possession and resort to a civil court be necessary to obtain actual possession. *Timmarasia* v. *Subba Bhatta* (7 M. L. R., 14) approved.—MALLEGOWDA *v.* CHELUVIAH ... 129

LAND REVENUE CODE (REGULATION IV OF 1888), s. 229—*Officer of Government—Construction—Jurisdiction.*] *Held* by the Full Bench (RAMACHENDRA IYER and KRISHNA MURTI, JJ., THUMBOO CHETTY, C. J., *dissenting*), that the words "Officer of Government" in s. 229 of the Mysore Land Revenue Code mean and refer to Revenue officers only and therefore the Munsiff has jurisdiction to entertain and try a suit against officers of the Public Works Department, and such a suit need not be brought in the highest court of the District.—HANUMANTHAPPA *v.* SRINIVASA ROW 243

LAND REVENUE CODE (REGULATION IV OF 1888), s. 221—*Exclusion of jurisdiction of civil courts—Onus on plaintiff to show exemption.*] The Land Revenue Code (Regulation IV of 1888), s. 221 prohibits the resort to civil courts in revenue matters except in specified cases. *Held* that a plaint which does not allege such facts as may bring the case within the exceptions named in the Code should be returned by a civil court as barred from its cognizance, it being the duty of the plaintiff to make out exceptional circumstances showing that the court has jurisdiction.—NADIGSWAMY RAO *v.* THE DEPUTY COMMISSIONER OF SHIMOGA DISTRICT 256

LEASE—*Wrongful possession—Collusion—Irrelevant issues—Finding without framing issue—Prejudice.*] The plaintiff sued to recover property which he alleged was wrongfully taken possession of by the 2nd, 3rd and 4th defendants from his lessee, the 1st defendant; the only questions for decision were whether the lease was *bonâ fide* and whether wrongful possession was obtained from the lessee. The plaintiff was entitled to sue and did sue in his own name and not on behalf of his family (of which he was but a junior member) for any declaration of their rights: therefore the issues raised and decided as to adoption, division and family rights were irrelevant and unnecessary. Issues were not framed on the question of lease and possession, but the judgments of the lower courts contained what were equivalent to concurrent findings on these points. As the plaintiff showed by his grounds of appeal to the District Judge that he was not prejudiced by the omission to frame specific issues but well knew what he had to prove and was prepared to stand or fall by the evidence on record, these findings must be taken as binding on him.—GUNGAPPA *v.* HANUMANTAYYA 5

LEASE—*Inadmissibility for want of registration—Admission of oral evidence to prove tenancy—Failure by plaintiff to prove his allegations—Admission by defendant—Proof of title in plaintiff other than as set up.*] *Per* RAMACHENDRA IYER, J.—The point for determination is whether the Munsiff was right in ordering the plaintiff to deliver possession of the land to the plaintiff. That the plaintiff is owner is not denied by the defendant. The Munsiff made no error in appreciating the evidence and his decree should be upheld. *Per* KRISHNA MURTI, J.—

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The oral evidence is discrepant inconclusive and unsatisfactory: nor is the Munsiff's appreciation of it correct. His finding cannot therefore be upheld that the relationship of landlord and tenant has been established between the parties; and he was wrong in applying the rule of estoppel to the case. Nevertheless, the defendant has not set up any right of his own, but clearly admits that the land belonged to the plaintiff, so there can be no question of the latter's title being superior and exclusive. If therefore the defendant has not established a right sufficient to entitle him to hold the land as against the plaintiff he is bound to give it up to the latter. Following *Chowdappa* v. *Goorappa* (6 M. L. R., 141) the plaintiff is entitled to a decree even though he failed to establish the lease on which he based the suit. The defendant, having admitted the plaintiff's ownership and there being no conclusive proof of any right strong enough to postpone that of the plaintiff, there seems no objection to give a decree for the rightful owner to take possession of the land. *Per* CURIAM—The lease was inadmissible in evidence, for want of registration; but other evidence could be received to determine the relationship of landlord and tenant. The Munsiff was right in giving a decree for possession to the plaintiff as rightful owner: and his decree should accordingly be confirmed.—HUTCHA *v.* VENKATA GOWDA 77

LEASE—*Attestation—Privity of contract—Joint liability—Collusion—Illegality.*] A witness to a lease is not bound by it nor does the mere fact that he attested it impose on him a joint liability. There is no privity of contract between him and the lessor; and he is not bound to restore the premises to the lessor, although he may have been occupying it together with the lessee. There being nothing to show that the witness regarded himself as the lessee, the mere fact that he vacated it in favor of the sons of a co-defendant shows no collusion on his part; nor in the absence of liability on his part is his act in so leaving the premises illegal. By vacating the premises after notice from the lessor he saved himself from liability.—KODANDA RAMA SHETTY *v.* NARASIMHAYA 93

LEGAL PRACTITIONERS REGULATION (No. III OF 1884)—*Gross professional misconduct—Punishment.*] A second-grade pleader, considering that a remark made by a Munsiff in a judgment reflected upon his professional skill and knowledge, wrote a scandalous letter to the judge impugning his partiality and exhorting him not to transact business on the bench while under certain influences and prejudices. *Held*, that the pleader was thereby guilty of gross professional misconduct and rightly punishable by suspension for twelve months, as recommended by the District Judge. *Per* RAMACHENDRA IYER, J.—I do not blame the pleader for writing the letter; but I blame him for the matter put in that letter. Assuming that the remark made by the judge was injurious to his character, he was wrong in traducing the the munsiff's character. *Per* KRISHNA MURTI, J.—Any enquiry as to whether the pleader had any grievance against the munsiff, real or imaginary, is quite irrelevant to the case.—In the matter of HIRANIAPA. 261

LIABILITY OF ADMINISTRATOR: *see* ADMINISTRATION 401

LIABILITY OF OFFICERS OF A COMPANY FOR MONEY DUE BY IT: *see* COMPANY REGISTERED 211

LIABILITY OF VENDOR TO VENDEE: *see* SALE 48

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LIMITATION: *see* CIVIL PROCEDURE CODE 201

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LIMITATION: *see* CIVIL PROCEDURE CODE 241
see MINOR 217
see RES JUDICATA 157
see RECOVERY OF LAND 101

LIMITATION—*Acknowledgment—Limitation Act (XV of 1877) s. 19—Agency —Evidence.*] The cause of action arose in 1888 and the suit was filed in 1890. The plaintiff alleged there were acknowledgments written in 1888 by *S* an agent of the defendants. His evidence was—"I am not aware of the defendants having appointed *S* as their agent. They appointed him to do certain things in my presence. The acts he was to do were to write letters; to recover moneys and to accompany them wherever they go. This was about 5 years ago. I have no personal knowledge of *S* being now with the defendants. I last saw him about a year ago." *Held*, this evidence does not prove that *S* was agent of the defendants in 1888 and that he had any authority to make an acknowledgment of their liability. The only other evidence is that of defendant No. 1, who was not present when the letters were written, and does not know under what circumstances and upon whose authority they were written. There being no legal acknowledgment such as to satisfy the requirements of s. 19 of the the Limitation Act, the suit is barred and must be dismissed.—MANNARIAH *v.* RANI DEVAMMAJI 97

LIMITATION FOR APPLICATION FOR SALE-CERTIFICATE: *see* CIVIL PROCEDURE CODE ... ... App. ii

LIMITATION ACT: *see* SUIT BY A MAHOMEDAN FOR SHARE IN FAMILY PROPERTY 431
see EXECUTION OF DECREE 455

LIMITATION ACT (XV OF 1877), SS. 5 AND 12 AND SCH. II, ART. 156—*Decree not made out till five years after judgment—Code of Civil Procedure (XIV of* 1882*), ss.* 205 *and* 215; *Sch. IV, No.* 132.] Judgment was delivered in a partnership suit on the 16th December 1886; but no decree was made out in the case till the 14th December 1891. The appellant claimed that limitation ran against him only from the latter date, and that he should be allowed the time necessary for obtaining copy of the decree then made: also that the court should in any case exercise in his favour the discretion permitted by s. 5 of the Limitation Act, as the delay was not caused by him but by the court or its officers. *Held* that, as the Code of Civil Procedure requires the decree to bear the same date as the judgment, such date is the starting point for the ninety days allowed by Art. 156 of Sch. II of the Limitation Act, and not the date upon which the decree may happen to be signed by the judge; that any time that may have elapsed before application for copy cannot be taken to be time requisite for obtaining a copy, and as the first application made by the appellant for copy of the decree was made more than a year after judgment had been prononnced, the appeal is barred by limitation. *Held further* (on review), that as the appellant delayed applying for a copy of the judgment and decree for over a year, no reason exists why the court should exercise in his favor the discretion given by s. 5 of the Limitation Act. *Also*, that though the judgment is too brief and does not fulfil the requirements of a final judgment, there is no doubt it was intended to be the final judgment in the case. There is nothing to show that the judge intended his judgment to be only a preliminary order; and the passing of a preliminary order

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under s. 215 of the Code of Civil Procedure, in the form No. 132 of Sch. II, is not imperative under the section, but only permissive.—Ross v. Dorasami Moodliar 353

Limited company—*Winding-up—Suit to recover assets.*] Where bonds form part of the assets of a limited company in process of liquidation, *Held*, that no suit upon such bonds can be brought by individuals on their own private account.—Krishnasamy Naidu v. Narasima Chetty 412

Local investigation—*Code of Civil Procedure (Act XIV of 1882) s. 260—Compromise of decree—Extension of time for payment of decree amount—Act—Decree.*] A mortgage decree was modified by agreement of the parties, whereby the first instalment of the mortgage-debt became payable on a certain date, but in default the judgment-debtors were to make over the crop of the mortgaged properties to the decree-holders and make good any deficit before eight months further had elapsed, so that virtually the time for payment of the first instalment was extended to the latter date. If by that date default was made, then the judgment-debtors became liable to pay the whole of the decree amount at once. One of the terms of the compromise, incorporated in the decree thereon, was that the judgment-debtors should cultivate and keep in proper order their estates. Before the further time abovementioned for payment of the first instalment (by making over the crop &c.) had expired, the decree-holders made an application for execution, which the District Judge appeared to treat as one for enforcement of the decree on compromise by attachment of the judgment-debtor's property under s. 260 of the Code of Civil Procedure; and he ordered a local investigation as to whether the judgment-debtors had cultivated and kept their estates in proper order agreeable to the terms of such compromise. *Held*, that the application to recover the amount of decree was premature and could not be admitted. *Also*, to enforce obedience under the Code of Civil Procedure s. 260, it is necessary that the decree must direct performance of or abstention from a particular act. Cultivating an estate and keeping it in order is not a particular act but a series of constantly recurring acts. Moreover keeping an estate in working order is an elastic expression. What constitutes proper working order from one man's point of view may not bear the same significance in the opinion of another. The "act" contemplated by the section cannot be one of this nature. *Further*, it is doubtful if the stipulation as to working the estates could legally form part of the decree as defined by the Code. It was neither a right claimed nor a defence set up in the suit, but was one of the terms of the compromise, a collateral agreement which, though incorporated in the decree, does not fulfil the requirements of a decree and cannot therefore be treated as such. *Sri Krishna Tata Chariar v. Singara Chariar* (I. L. R. 4 Mad., 219) approved and followed.—Kabinahithalu Sankar Bhatta v. Saval Doss Jatanand Sait ...456

Lower appellate judgment, when to be preferred to that of court of first instance: see Circumstances when lower appellate judgment is to be preferred to that of court of first instance 30

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Mahomedan law—*Burial ground—Resumption of land dedicated as a cemetery—Specific relief—Damnum absque injuriâ—Objection first*

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raised in appeal—Damages—Costs.] The defendant had built a house upon land forming part of a disused Mahomedan cemetery where the plaintiff's brother had been interred. The plaintiff sought to have this building removed and his brother's bones reinterred and to be permitted according to Mahomedan custom to offer up prayers at the grave. *Held*, that under Mahomedan law when once land is dedicated to the use of the public as a cemetery and people have been buried in it, it is not competent to the original proprietors of the land, even after it has ceased to be used as a burial ground, to convert it to their own use so as to debar the relatives or descendants of the dead whose remains are interred in it from performing the religious rights enjoined by the Mahomedan religion. The acts of the defendant constituting an injury not only to the religious feelings of the relatives of the dead but also to their legal rights, the suit is maintainable. *Further*, it being a matter in which religious feelings are wounded any pecuniary compensation that could be awarded might not be an adequate relief for the injury sustained, therefore specific relief is the correct remedy. The objection that the alleged grave occupied only one-fourth part of the building ordered to be removed not having been raised in the lower court, ought not to be entertained on appeal. As costs are a matter in the discretion of the lower court, which did not seem to have exercised such discretion wrongly, the decree in that respect should not be interfered with.—ZYNABI *v.* MAHOMED KHAN ... 376

MAHOMEDAN LAW—*Commensality—Separate property—Presumptions—Shares of the widow and daughters of a deceased Mahomedan in his estate.*] The widow and daughters of a deceased Mahomedan sued his two brothers to recover immovable property alleged to be part of his separate estate. The brothers contended it was the common property of themselves and the deceased. *Held*, that the burden of proving that the lands in suit are the common property of the deceased and themselves lay on the defendants. Even granting that they lived in commensality they did not form a joint family in the sense in which that expression is used with regard to Hindus, and there is no presumption in Mahomedan, as there is in Hindu, law, that the acquisition of the several members are made for the benefit of the family jointly. The rules and presumptions which are applicable to a joint Hindu family cannot be applied to a Mahomedan family living jointly, unless they have adopted the Hindu law of property. The Mahomedan law presumes that each share is separate and that each sharer is the separate owner of his share. If such sharers wish to live together they may do so, but their separate ownership and relations are not changed. The defendants have failed to prove that the land was purchased with family funds or that they participated in its profits. The widow and daughters are not entitled to the whole of the deceased's property. Under the Mahomedan law they are entitled only to one-eighth and two-thirds respectively. The deceased's daughter who survived her father, was entitled to one-third of the daughters' two-third share. As her representatives have not joined in the suit the other two daughters cannot recover more than their shares, *viz.*, two-ninths each or four-ninths in all, and the widow a one eighth share.—YACOOB SAIB *v.* HAMIDABEE ... 442

MAINTENANCE: *see* HINDU LAW 115

MAINTENANCE—*Agreement by wife to surrender claims—Waiver by husband of rights under agreement—Power of mother to bind her minor daughter—Code of Civil Procedure (Act IV of 1882 s. 34—Objections as*

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to parties—Mother representing minor child in suit.] In a suit by a widow against her deceased husband's representatives for maintenance of herself and daughter and marriage expenses of the latter, an agreement made by the plaintiff with her late husband, by which she abandoned her claim to maintenance in consideration of the present payment of a lump sum, was set up by the defendants in answer to the claim. It appeared that, in maintenance proceedings subsequently taken by the wife against the husband under the Code of Criminal Procedure, he did not set up the agreement, but consented to an order for a monthly allowance. *Held,* that from the circumstances of the husband refraining to plead the agreement in the Magistrate's Court as a bar and consenting to an order for payment of a monthly allowance, it might reasonably be inferred that he knew the document had been obtained by unfair means or did not wish legal effect to be given to it: and that it could not therefore be raised to bar the present suit of the widow. *Held further,* that a mother is not competent by such an agreement to bind her minor daughter and deprive her of the rights the law confers on her. It was also objected that the mother could not sue in her own name only for her minor daughter, who should be on the record in her own person as plaintiff. *Held,* that, as the objection can only be raised before the first hearing under s. 34 of the Code of Civil Procedure and when not so taken shall be deemed waived, it is too late to urge it on appeal. *Further,* that the daughter being a minor, even had her name been placed on the record, she would only have been nominal plaintiff, her mother representing her in the conduct of the suit to all intents and purposes. On the evidence, held that the lower court was right in finding the defendants to be in possession of the property of the deceased and that the same was liable to the plaintiff's claim. The amount decreed by the District Court not being excessive, its decree was confirmed.—CHICKA NIJAGOONAPA *v.* SIDLINGAMA 361

MALA FIDES: *see* MASTER AND SERVANT 268*a*

MARSHALLING SECURITIES: *see* PUNNAY LANDS 1

MASTER AND SERVANT—*Criminal responsibility—Acts mala in se—Guilty knowledge—Mala fides—Assumption of—Fees under Court Fees Act.*] The *mala fides* and guilty knowledge of a servant should be positively and affirmatively proved and ought not to be presumed. Guilty knowledge or intention is an essential ingredient in the offence of mischief and when this is wanting, the conviction cannot be upheld. Fines and fees under the Court Fees Act ought not to be mixed up in awarding punishment.—RAMASWAMIA *v.* VENKATASUBBA 268*a*

MEASURE OF DAMAGES: *see* DAMAGES 111

MERE USE OF WORDS OF VULGAR ABUSE NOT PUNISHABLE: *see* PENAL CODE App. x

MESNE PROFITS: *see* LAND REVENUE CODE 129

MILK DILUTED WITH WATER—*Penal Code* (*Act XLV of* 1860), *ss.* 272 *and* 273.] Mixing water with milk does not render the milk injurious to health so as to make the act an offence under ss. 272 and 273 of the Indian Penal Code.—THE QUEEN-EMPRESS *v.* KALI ... 470

MINOR: *see* MAINTENANCE 361

MINORS—*Code of Civil Procedure* (*XIV of 1882*), *Chap. XXXI—Omnia præsumuntur rite esse acta—Proof against heirs of deceased.*] The appointment of a next friend or a guardian to a minor under Chapter XXXI of the Code of Civil Procedure should not be regarded as

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merely a *pro formâ* proceeding. The Court should make a complete enquiry and ascertain that the person to be appointed has no interest adverse to the minor and is a proper person fitted in every way to guard and protect that minor's interests. Although it does not appear on the record that such enquiry was held, yet it must be presumed that the requirements of the law have been duly complied with. Applying the rule of the Privy Council in *Lashi Parshad* v. *Maharaja Narendro Kishore Singh Bahadoor* (L. R. 19 I. A., 9) that "in an action brought to recover money against the heir of a deceased person it has always been necessary to establish as reasonably a clear case as the facts will admit of", the Court *held* the plaintiff had failed to prove his case and his suit should be dismissed.—PADMAIYA v. SUBBARAYA 108

MINOR—*Guardian—Fraud—Collusion—Court-sale, setting aside—Limitation—Limitation Act (XV of 1877) Sch. II, Art. 12—Costs.*] The plaintiff sued on the 17th January 1887 to recover property sold on the 26th October 1882 at execution sales confirmed on the 9th January 1883 and not set aside. He alleged that being then a minor he was not properly represented and the decree was therefore void; also that his mother, who assumed to represent him, was guilty of fraud and collusion. *Held*, that the plaintiff's mother was his natural guardian and legally competent to represent him in court, which she did. *Also*, that as against purchasers at court sales who were utter strangers, any plea of fraud not as against themselves personally, could not avail the plaintiff. But as to the facts no fraud was proved, though there might have been carelessness. *Also*, that the proper procedure for advancing ground to set aside a decree is by way of review and not by separate action. *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (I. L. R. 12 Cal., 69) approved: and no suit to set aside a sale after one year from its confirmation can be entertained, even though the decree in execution of which the sale had taken place had been reversed by the appellate court. *Parshadi Lal* v. *Muhammad Zain-ul Abdin* (I. L. R. 5 All., 573) followed. *Further*, that there being no fraud, the limitation applicable is that prescribed by Sch. II, Art. 12 of the Limitation Act, namely, one year from the date of confirmation of the execution sale; and that making all allowances for the plaintiff on account of his minority his suit is nevertheless barred; but as the objection of limitation was taken only at a late stage in the appellate court, each party there should bear his own costs and the plaintiff pay those of the defendants in the lower court only.—SUBBIA v. BABUR MUNISAMY 217

MINORITY: *see* RECOVERY OF LAND 101

MISCONDUCT: *see* CIVIL PROCEDURE CODE 201

MISREPRESENTATION: *see* SALE 48

MORTGAGE: *see* PUNNAY LANDS 1

MORTGAGE—*Covenant for quiet enjoyment—Possession—Transfer of Property Act (IV of 1882), ss. 67 (d) and 68 (c)—Parties.*] *A* mortgaged immovable property to *B* and *C* with a proviso that they should have possession for twenty years, taking the produce towards interest and principal. *A* also covenanted that if their possession was disturbed he would be answerable for any loss. At the time of the mortgage the property was in the possession of third parties whom *A* sued for possession. He compromised the suit allowing them to retain possession on certain terms as mortgagees. Subsequently *C* assigned his right to recover one half of the mortgage-debt to *E*, who sued *A*, *B*

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and *C* for such half and interest. *Held*, that, there being a covenant in the mortgage deed whereby the mortgagor was made liable to the mortgagees for any loss they might suffer by reason of any obstruction or resistance to their possession or enjoyment by him or his heirs or by strangers, the mortgagor was liable to make good the amount of the mortgage money to the mortgagees, that being the loss they suffered by reason of not being put in possession and the mortgagor having admitted the title of a third party whom he allowed to remain in possession: and even in the absence of such a covenant, the mortgagees were entitled under s. 68 (*c*) of the Transfer of Property Act (IV of 1882) to recover the mortgage money. *Also*, that, whether as a co-mortgagor or as a co-creditor, *C* was competent under the Transfer of Property Act to transfer his rights under the mortgage to *K*, the plaintiff. Section 67 (*d*) of the Transfer of Property Act does not bar the suit, because that provision applies to suits for foreclosure or sale but not to suits for the recovery of the mortgage money, and in the present suit no relief is claimed against the mortgaged property. As *B* refused to join with *K* in suing for the mortgage-debt and denied his right *in toto*, *K* was justified in suing alone for his share of the money and *B* and *C* were rightly made defendants in the suit.—PACHUDA BIDIA *v.* KRISHNIA 435

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MOTHER SUCCEEDING SON, RIGHTS OF: *see* HINDU LAW 71

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MUTT—*Grant of trust property—Consideration—Acquiescence—Nature of suit.*] The Guru of the *O* Mutt in 1842 executed a deed to his sons granting them a village, mutt and brindavanams subject to the performance of puja and other conditions therein specified. Through them it came to the defendant's father, and after his minority, the property having in the meantime been managed by the *O* Mutt for and on his behalf, it was by a subsequent deed restored to him to be held and enjoyed in accordance with the terms of the original grant. The suit was brought by the present Guru of *O* Mutt on the allegation that the terms of the grant were not fulfilled, and to recover the property on the ground that the defendant had broken the conditions of the grant and was guilty of mismanagement and misconduct. *Held*, that the fact that the grantee undertook to manage the affairs of the mutt, to look after the brindavanams, to perform ceremonies, &c., as required by the grant constitutes a sufficiently good and valid consideration. *Further*, that whether the grant was such as the then Guru could have legally sanctioned or not, the present plaintiff, having acquiesced in the arrangement and allowed the defendant to appropriate the produce of the property for the purposes mentioned in the grant, could not now refuse to be bound by it; the more so as the present suit is not based on the inalienability of the property granted or the incompetence of the Guru to make the grant; but on the ground that the terms of the grant were not fulfilled and that the defendant had by his misconduct and mismanagement rendered himself liable to be divested of the property.—SATHYA DHEERA SREE PADANGALAVAROO *v.* GOOLI BALACHAR... 84

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PARTNERSHIP—*Onus—Accounts—Exclusion of oral by docum ntary evidence.*] The plaintiff claimed a share as partner in a business on an oral agreement. In his evidence he stated that the terms of the agreement were reduced to writing in the day-book and signed by the parties; but of this no mention was made in the plaint. It was urged on behalf of the defendant, *inter alia,* that the day-book produced was not the real one, as it did not appear to be kept in the ordinary course of business and contained but a few entries. *Held,* that if the terms of the agreement were reduced to writing in the day-book, as alleged, such written agreement was the final contract upon which the suit ought to be based. After asserting that the terms of the agreement had been reduced to writing it was not open to the plaintiff to adduce oral evidence of its contents until he had taken the necessary steps entitling him to adduce secondary evidence. The trade extending over but a few months and being a cash business did not require regular and systematic accounts and it could not be said that the day-book produced was one cooked-up for the purpose of the suit. The burden of proving by clear and unmistakeable evidence that he was a partner in the trade, entitled to one-fourth profits, lay on the plaintiff. He failed to discharge the burden, the evidence relied on in his favour being quite consistent with the hypothesis that he was only a sub-

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partner of his brother. His suit must therefore be dismissed.—MAHOMED HUSAIN *v.* ALIM BEE... 405

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PENAL CODE (ACT XLV OF 1860), ss. 211, 511 AND 193—*Abetment—Preparation—Conspiracy—Evidence—Intention—Motive.*] The prisoner was accused of having made a false complaint of theft of jewellery and currency notes as having occurred in his house and of having wrongfully accused one *M* of the crime, in support of which he also gave evidence and especially produced a list of the stolen property in which were noted certain currency notes proved to have been cancelled and withdrawn from circulation long previous to the date of the alleged theft, as well as articles of jewellery and a bond which *S* stated had been given to him by the prisoner for the purpose of being placed in one *R's* house in pursuance of an agreement made with the police, which was not carried into effect. *Held* by the Court (KRISHNA MURTI and RAMACHENDRA IYER, JJ.), that the evidence did not prove an offence punishable under s. 211 or s. 193 of the Penal Code. But (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) the accused was rightly convicted on the charge under s. 511/193, Penal Code, of abetment of the offence of fabricating false evidence. *Per* KRISHNA MURTI, J.—One of the essential ingredients for a charge under s. 211, Penal Code, is found wanting. The accused cannot be found to have lodged the complaint without just or lawful ground; and the prosecution does not attempt to establish any intention on his part to injure *M*. With regard to the charge under s. 193, Penal Code, the facts only constitute an abetment, not an attempt. The accused did not himself attempt to throw the jewels into *R's* house. He instigated others to do so and aided them, if the acts alleged against him are true, by lending them the jewels; but they did not make any preparation to commit the offence; much less did they attempt it. If, however, any offence was intended, the design was inchoate and did not mature itself into any preparation; much less could it therefore be regarded as an attempt to commit an offence by the police or an abetment of that attempt by the prisoner. *Per* THUMBOO CHETTY, C. J.—In all criminal cases we have to see whether what was done by the accused was done intentionally. Motive is not very essential though intention and motive may often concur and proof of motive may demonstrate the intention; but absence of motive will not excuse an illegal intention. If an illegal act is done intentionally without just cause or excuse, we must presume that there was sufficient intention to injure, whether the motive that prompted such intention be good or bad. When the facts of the case are such as show that the accused in making the complaint acted with a reckless disregard for the rights or liberties of others and was grossly negligent in ascertaining the truth, he cannot be said to have had reasonable and probable cause or good and just ground for making the complaint or accusation. * * * The complaint made by

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the appellant in so far as it implicated *M* was without just or reasonable cause. The criminal proceedings taken by the police against *M* upon information given by appellant were unjustifiable under the circumstances. So far as *M* was concerned she was unjustly suspected and accused. The information given against her was intended to be acted upon by the police inspector and was actually acted upon to her prejudice and injury and therefore the appellant has committed an offence punishable under s. 211, Penal Code. So far as the appellant was concerned it seems that he had completed his preparations for fabricating false evidence and actually sent the jewellery and bond to the police in order to induce the latter to place them in the house of somebody so that they might eventually be used as evidence against the person in whose house they may be found. He did what was necessary to facilitate the commission of the offence by the police and if he failed in his attempt it was by reason of the police having refused to carry out his intention. His acts clearly amount to an attempt to fabricate false evidence through the instrumentality of the police. As to the fact of a theft, it is unnecessary to consider what was the motive in preferring the false complaint. Whether it was to defraud his daughter-in-law or to bring *R* into trouble the fact remains that the complaint, if not wholly untrue, was quite false with regard to the cancelled notes: and the appellant was therefore guilty on the third charge. *Per* RAMACHENDRA IYER, J.—I am of opinion that there is no adequate evidence to support a conviction under s. 211 of the Penal Code. I think the Magistrate was not wrong in convicting the accused upon the second charge. Even if the police did not join in the conspiracy, the accused was an abettor (*see* Penal Code, s. 108 Ill. (*a*)). He was not guilty of an attempt to fabricate false evidence. The conviction will be altered accordingly but the sentence need not be altered.—GOVERNMENT *v.* VENKATA ROW ... 303

PENAL CODE (ACT XLV OF 1860), s. 504—*Abuse—Intention—Breach of the peace.*] *Held,* that an altercation in words of an ordinary nature not such as to cause insult or provocation likely to induce the complainant to commit a breach of the peace is not an offence under s. 504 of the Indian Penal Code. *Per* KRISHNA MURTI, J.—Knowledge or intention is a necessary ingredient of an offence under s. 504 Indian Penal Code and where the accused is not shown to have a knowledge or intention to commit a breach of the peace his conviction is bad in law. *Per* THUMBOO CHETTY, C. J.—It is not necessary there should be an actual breach of the peace to bring the offence under s. 504 of the Indian Penal Code. It is sufficient if the language used was such as was likely to cause the person insulted to break the peace.—GOVERNMENT *v.* VENCATARAMIA 298

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PENAL CODE (ACT XLV OF 1860), s. 504—*Abuse—Breach of peace—Intention—Mere use of words of vulgar abuse not punishable.*]—GOVERNMENT *v.* HAZRAM BEE ... ...App. x

PENAL CODE (ACT XLV OF 1860), ss. 353 AND 441—*Forest Rules, s. 11 (40)—Cattle Trespass Act (I of 1871) s. 24—Separate complaint and trial for various offences committed at the same time—Previous discharge—Bar to subsequent proceedings—Powers of court of revision—Conversion of acquittal into conviction—Code of Criminal Procedure, ss. 235, 403, 439.*] The accused had committed several offences against the Penal Code, the Cattle Trespass Act and the Forest Rules, They had been tried

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and discharged on complaint for the offences under the Penal Code (*ss.* 353 and 441) and were subsequently tried and convicted by another Magistrate for the offences under the Cattle Trespass Act and Forest Rules. On appeal their conviction was set aside, the Appellate Court holding their previous discharge to be a bar to the subsequent proceedings. On reference by the District Magistrate from this appellate order, it was *held* by the Chief Court that, an order of discharge not being equivalent to an acquittal (Code of Criminal Procedure, *s.* 403, Explanation) and the offences being moreover separate and distinct (Code of Criminal Procedure, *s.* 403, second paragraph), the previous order was no bar to the subsequent trial: and that the last paragraph of *s.* 439 of the Code of Criminal Procedure does not prevent a court of revision from setting aside the order of acquittal and directing a new trial, such course not being tantamount to the conversion of an acquittal into a conviction.—GOVERNMENT *v.* KALA ... 278

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POSSESSORY MORTGAGE—*Liability of mortgagee to take care of the mortgaged property—Onus of proof—Sub-mortgagee—His liability—Damages how estimated—Principles to be followed in absence of definite enactment.*] *Held*, that a mortgagee in possession is bound to take as much care of the property as a prudent owner would: and it is generally immaterial whether any negligence that may cause loss is imputable to him or his assignee; but on the facts found by the Munsiff, the person in the present case liable to the plaintiffs for damages is defendant No. 2. *Held further*, that the amount of damages in the case is to be estimated by the value of the old house and not by the sum it would cost to build a new one. *Per* RAMACHENDRA IYER, J.—There being no Regulation in force in Mysore defining the rights and obligations of a mortgagor and mortgagee, principles to decide a case thereon must be sought elsewhere. The law applicable to a bailee may be applied to a mortgagee in possession. On reference to the laws of British India, England, America and Rome, a duty somewhat similar is thrown on the mortgagee. A rule which is to be found in the laws of so many countries must rest upon some strong and clear reason which necessarily led lawyers in distant countries and different ages to the same conclusion; and may be adopted by the Chief Court of Mysore without hesitation. The destruction of the property is *primâ facie* evidence of want of diligence. The onus lies on the mortgagee of proving that he took as much care as he was bound to take and that it was not owing to his want of due care and diligence that the house was destroyed. *Per* THUMBOO CHETTY, C. J.—A mortgagee in possession holds the estate strictly as a trustee. He may not be liable for want of extreme precautions, but he would be liable if it be shown that he omitted to take that care which every man of common prudence with ordinary caution is expected to take of his own property. —RAMANNA *v.* SOOBANARANAPPA 120

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PUNNAY LANDS—*Rights of Inamdar—Mortgage by Inamdar, effect of—Extinguishment of tenant's rights—Second mortgage—Right of redemption—Marshalling securities.*] *Punnay* land means land which is absolutely at the disposal of the Inamdar, or land in which another person has not acquired a right of occupancy by law or custom. If a tenant having a right of occupancy surrenders his right or it is otherwise extinguished, the entire estate vests in the landlord; and the land becomes absolutely at his disposal. A mortgage by an Inamdar without any reservation of right in his own favour, transfers to the mortgagee all rights the mortgagor is capable of transferring. The defendant, who purchased the garden at sale in execution of a mortgagee-decree obtained by himself and the land at sale in execution of a money-decree against the Inamdar, sought to be allowed to redeem the first mortgage (at sale in execution of decree upon which the plaintiff purchased) in case the plaintiff's claim for possession should be upheld. *Held*, that, on sale of the property under the first mortgage, the defendant ought to have protected his interests by seeking an order that the first mortgagee should resort primarily to the mortgaged property other than the garden: the defendant not having done this and the first mortgagee having executed his decree and acquired a valid title by purchase, the latter cannot be compelled to submit to partial redemption. As to the land (which was not mortgaged to him) the defendant ought to have asserted his rights when the first mortgageee's decree was under execution; that decree having been executed he has now no right, any more than the mortgagor himself, to seek partial redemption.—VENKATRAMANIAH *v.* NARNIENGAR 1

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RAILWAY ACT (IV OF 1879), SS. 25, 26 AND 46—*Engine-driver leaving his post—Breach of duty—Jurisdiction of magistrate.*] An engine-driver left his train at *B* Station and did not get into the train again till it reached *R* Station. He was charged under sec. 46 of the Railway Act (IV of 1879) and found guilty under sec. 26 (*c*) of the same Act by a Second-Class Magistrate. *Held*, that the offence of the accused came under sec. 25 of the Railway Act and was properly triable by the Second-Class Magistrate.—GOVERNMENT *v.* LINEN 275

REASONABLE TIME FOR DEFENCE: *see* CIVIL PROCEDURE CODE 201

RECOVERY OF LAND—*Minority—Fraud—Setting aside revenue sale—Limitation—Limitation Act (XV of 1887), s. 7; Schedule II, Art. 12 and Art. 95.*] The plaintiff having attained his majority on the 6th October 1887 sued on the 2nd March 1891 to recover land purchased from his alleged guardian by defendant No. 1 in August 1882, and by defendant No. 2 in July 1887 at a sale for revenue-arrears confirmed before the 3rd October 1887. He alleged fraud which both Courts found not proved. *Held* that, there being nothing to show the plaintiff had by means of fraud practised by the defendants been kept in ignorance of the revenue-sale, he cannot claim the benefit of the Limitation Act, s. 18; and Schedule II, Article 95 does not apply to the case. The suit is virtually to set aside the revenue-sale, and until that is set aside the plaintiff cannot get back his land. The period of limitation prescribed by the Limitation Act is that in Schedule II, Art. 12, one year from the time the sale is confirmed. It was confirmed in October 1887, in which month also the plaintiff attained his majority. He had therefore under Art. 12 of Schedule II, or under s. 7 of the Limitation Act, one year from that date to bring his suit. *Per* KRISHNA MURTI, J.—If the land had remained with defendant No. 1 without passing on to defendant No. 2, there would have been no difficulty in deciding that the transfer was void *ab initio*, having been alleged to have been made by a minor, and that the suit was within time as it was for the recovery of land and was laid within twelve years from 1882, when the alleged transfer took place.—SRINIVASIENGAR *v.* NANJUNDA BHATTA ... 101

RECOVERY OF MONEY PAID UNDER PRESSURE—*Compulsion—Undue influence—Free agency—Voluntary payment.*] *A* paid money levied from him by *B* under the name of a fine for violation of caste rules. It was proved that *B*, though a head-man, had no authority from the Caste to levy such a fine and that he acted singly and arbitrarily. He also used pressure to prevent the celebration of *A's* son's marriage until the fine was paid. *A* knew that *B's* conduct was unjust, but nevertheless paid the money in order that the marriage ceremony might not be disturbed and to secure peace of mind and the honor of his family. *Held*, that, under these circumstances the payment was not voluntarily made and *A* could recover the amount from *B* as money obtained by the latter by undue influence. The doctrines of English Equity as laid down in Story's Equity Jurisprudence, s. 239 and *Hall v. Hall* (L. R. 1 P. and D., 482) approved.—ANNAY GOWDA *v.* MALLAY GOWDA 42

REDEMPTION: *see* PUNNAY LANDS 1

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Reduction in subsequent suit of compensation awarded by previous decree: *see* Res judicata 341

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Reference in appealable case—*Court not competent to refer.*]—Chickaveeray Gowda *v.* Hoochaveerapa ... ... App. ix

Refund of compensation—*Enforcement of order for refund—Attachment of property—Disposal of claims—Civil suit.*] If there is any dispute regarding the ownership of property attached by a criminal court, it is inadvisable to order a sale until the claimant has had an opportunity of establishing his claim in a civil court.—Erama *v.* Sidapa Chetty 474

Registration: *see* Inchoate agreement 225

Registration, inadmissibility for want of: *see* Lease 77

Registration of house in name of member of undivided family—*Payment of assessment by family—Evidence of title—Specific Relief Act (I of 1877) s. 9—Possession—Hindu widow—Joint possession—Survivorship—Bhandu—Right to dwell in husband's family-house—To resist ejectment—To eject trespassers—Right of purchaser.*] *Held*, that the registration of a house in the name of a member of a Hindu family and payment of assessment by that family are *primâ facie* evidence of the title of that family to the house; and, in the absence of rebutting evidence and of evidence that it was the self-acquired property of any particular member, it must be held to belong to the family. *Held also*, that, although the possessors of property may have no right to it, they are entitled, except in a suit under the Specific Relief Act s. 9, to hold possession until ousted by the legal owner and to put claimants to proof of their title. *Held also*, that a Hindu widow cannot claim title to her late husband's family-house either on the ground of joint possession and survivorship or on the ground of being a Bhandu. *Jogdamba Koer* v. *Secretary of State for India* (I. L. R. 16 Cal., 367) followed. *Held further*, that a Hindu widow's right to dwell in her husband's family-house is not an imperfect and inchoate right, but a substantial legal right: so long as her right to maintenance and residence is not determined by a decree or by a private arrangement made with their consent, she cannot be ousted from the family-house by her husband's heirs or by purchasers from them: and a purchaser's title is subject to a widow's right to reside in the family-house. *Talemand Singh* v. *Rukmina* (I. L. R. 3 All., 353); *Dalsukhram Mahasukhram and others* v. *Lallubhai Moti Chand* (I. L. R. 7 Bom., 282); *Ramanadan* v. *Rangammal* (I. L. R. 12 Mad., 260) approved. *Held further*, that, such being the right of a Hindu widow, it is sufficient to entitle her to eject from the family-house those who are mere trespassers. *Sundar* v. *Parbati* (I. L. R. 12 All., 51) approved, as being in point. —Chicka Byamma *v.* Nanjannah 135

Res judicata—*Code of Civil Procedure (Act XIV of 1882), s. 13 Expl. II—Ground of defence—Limitation—Debt—Voluntary payment—Contract Act (IX of 1872) ss. 69, 70.*] The defendant having by previous suit obtained possession of certain land from the plaintiff, the latter sued him to recover the value of improvements made by him to the land while in his possession and also to recover monies alleged to have been paid in clearing off mortgages. *Held*, that the question of allow-

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ance for improvements should have been decided in the former suit for possession, it being a matter which might and ought to have been made a ground of defence in such former suit; and it is now *res judicata.* (Code of Civil Procedure, s. 13, *Expl.* II). *Held also,* that the redemption of the mortgages, even if in fact made by the plaintiff, were voluntary payments made not for the defendant's benefit but to perfect the plaintiff's own title and as part of the consideration for the alleged sale to him. That sale, having been held by the court in the former suit, not to be true, the plaintiff had no legal title to the land and no manner of interest in it. Therefore such payments would not come under either s. 69 or s. 70 of the Indian Contract Act. ***Further,*** that the limitation for any such payment would be three years from the date of such payment, if it was a debt at all; but if it was not in its inception a debt, the subsequent dispossession of the plaintiff would not make it one and would not give any fresh start for limitation.—MUNI NANJA *v.* MUNIGA... 157

RES JUDICATA—*Reduction in subsequent suit of compensation awarded by previous decree—Grant of relief unasked for by plaintiff and on matter he is not concerned with—Decision in suit binding on parties only or their representatives—Code of Civil Procedure (Act X of 1882), s. 13.*] In 1888 *C* obtained a decree against *N* on a hypothecation dated in 1881 and purchased the hypothecated lands at sale in execution of the decree. In 1889 *T* obtained a decree against *N* for recovery of the lands as being his property and for compensation in respect of some that had been sold. *C* then, in 1891, filed a suit against *T* to recover possession of the lands he had purchased in execution of his decree of 1881 and for partition from *T's* lands. The lower court decreed a portion of the lands sued for to *C* and reduced the compensation awarded to *T* in the previous suit. *Held,* on appeal, that the land sued for being included in the hypothecation of 1881. *C's* suit is not *res judicata.* The decision in a suit can be binding on those only who are either parties to it or claim under them by a title arising subsequent to the commencement of that suit. This is the reasonable construction to be placed on s. 13 of the Code of Civil Procedure and is supported by the rulings in *Bonomalee Nag* v. *Koylash Chunder Dey* (I. L. R. 4 Cal., 692); and *Sita Ram* v. *Amir Begam* (I. L. R. 8 All., 324). The hypothecation to *C* took place in 1881, while the suit by *T,* in which it was ruled that the property was his, was filed only in 1889 and *C* was no party to it. *Held also,* that the lower court had no power to reduce the compensation awarded to *T* in a previous suit. Whether that decision was right or wrong, it was final and conclusive as between *T* and the parties to that suit. It was not open to the District Court to meddle with that decision in the present suit, the plaintiff not being at all concerned with the question of compensation nor having asked for any relief on that score. On the facts found, the decree was modified.—THIPPIA *v.* CHICK RUDRAPA 341

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SALE—*Liability of vendor to vendee—Absence of covenant in deed—Failure of consideration—Misrepresentation—Fraud—Plaint—Clearness—Code of Civil Procedure (Act XIV of 1892) ss. 177, 188.*] A vendor professed to sell no more than the right, title and interest he possessed. This only was stated in the sale-deed which contained no covenant for title or further assurance. The vendor therefore cannot be made liable to his vendee for fraud, misrepresentation or failure of consideration in the event of such right, title and interest subsequently turning out less than the vendee anticipated, it having moreover been open to the vendee to make all necessary enquiries before purchase. *Per* RAMACHENDRA IYER, J.—The vendee having filed a plaint which did not clearly disclose what his cause of action was, the Munsiff should have insisted on its amendment. Ambiguous pleadings are to be remedied by careful scrutiny and exercise of the powers given to courts under ss. 117 and 118 of the Code of Civil Procedure.—APPAY GOWDA *v.* THIMMAPPA... 48

SALE OF MORTGAGED PROPERTY BY MORTGAGOR AFTER DECREE ON MORTGAGE —*Liability of purchaser to decree-holder—Remedy of decree-holder for acts of purchaser tending to waste or diminish security—Second suit for damages—Civil Procedure Code (Act XIV of 1882) s. 268—Purchaser, representative of judgment-debtor for purposes of execution—Conversion of suit for damages into one for declaration—Direction in decree that plaintiff should proceed in execution.*] The plaintiff having obtained a decree on a mortgage, his judgment-debtor subsequently sold a portion of the mortgaged property to *L*. The plaintiff then filed a second suit against his judgment-debtor and *L* for damages on the allegation that they had by collusion and fraud, carried away the materials of a house and granary subject to the mortgage, thereby preventing the execution of his decree or diminishing his security. A decree was given by the court of first instance upon which the District Court, in appeal, ordered no execution should issue, but that it should be viewed only as a delaratory decree; and directed the plaintiff to take out execution of his original decree under sec. 268 of the Code of Civil Procedure. *Held* by the Chief Court, on second appeal, that when a mortgagee has obtained a decree against the mortgagor and the mortgaged property, if a third person voluntarily purchases the property from the mortgagor and if he destroys it or wastes it or otherwise diminishes the value of the security, such third person is a representative of the mortgagor for the purpose of execution of the mortgagee's decree: and the question of damages or compensation is one which ought to be determined in execution and not by a fresh suit. *Further* (*a*) that the District Judge had no power to convert a suit for damages into one for declaration of title; (*b*) that when the plaintiff was in a position to sue for consequential relief and he did in fact sue for damages

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there were no grounds at all for making a decree for a bare declaration; (c) that the decree ought not to contain a direction that the decree-holder should take proceedings in execution under the Code of Civil Procedure: and on these grounds alone the decree of the District Judge might properly be reversed and the suit be dismissed.—LINGANNA v. GURU SIDDAPPAH 9

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SANCTION TO PROSECUTE—*Appeal—Code of Criminal Procedure (Act X of 1882), s. 185.*] Section 195 of Act X of 1882 declares that any authority to which the authority giving or refusing sanction is subordinate, may revoke or grant such sanction. There is therefore by this enactment an appeal to the Sessions Court from an order of a subordinate magistrate granting sanction to a prosecution for forgery and perjury.—GINAMA, Petitioner 476

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SECOND APPEAL BY SUCCESSFUL PARTY NOT OBJECTING IN REGULAR APPEAL.] A plaintiff, respondent in the lower appellate court, did not appeal in that court nor make any objection to the decree when appealed against by the defendant. The lower appellate court confirmed the original decree. *Held*, that it was not open to the plaintiff to prefer a second appeal upon a point regarding which he did not appeal nor raise any objection in the District Court.—SANTHE GOWDA v. VEERABHADRA GOWDA 440

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SMALL CAUSE COURT—*Jurisdiction—Suit for damages for trespass—Incidental decision as to title.*] The mortgagees with possession of a village sued on the Small Cause side of the Munsiff's Court to recover damages caused by the trespass of the defendants. The Munsiff dismissed the suit as being not maintainable in a Small Cause Court. *Held*, that there was nothing to prevent the decision by the Small Cause Court of the question of damages, even though the question of title had to be incidentally adjudicated upon; and in any case the Munsiff ought to have transferred the case to his regular file and tried it as an ordinary suit. He was wrong in dismissing it.—KRISHNAPPA *v.* CHENNA BASAPPA 259

SON'S LIABILITY TO PAY FATHER'S DEBTS: *see* DOCUMENTARY EVIDENCE PREFERABLE TO ORAL TESTIMONY 196

SPECIFIC RELIEF: *see* MAHOMEDAN LAW 376

SPECIFIC RELIEF ACT (I OF 1877), s. 42—*Payment of rent by tenants—Constructive possession—Amendment of plaint—Code of Civil Procedure (Act XIV of 1882), s. 53 proviso.*] A plaintiff out of possession cannot maintain a suit for mere declaration of title. The party to whom tenants in possession of property pay rent, is the person who is constructively in possession of such property. *Held*, on the facts, that the defendants were receiving rents from tenants, and so were in constructive possession and that the plaintiffs could not therefore under the *proviso* to s. 42 of the Specific Relief Act sue for a bare declaration, without at the same time asking for possession. *Held also*, that the plaintiffs could not be permitted to amend their plaint by adding a prayer for possession, as that would be to convert the suit into one of another and inconsistent character.—TAJEE BEE *v.* MIDAKARA JAILBDEEN 368

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SUIT BY A MAHOMEDAN FOR SHARE IN FAMILY PROPERTY—*Limitation Act (XV of 1877), Sch. II, Arts 123, 127, 141 and 144.*] A Mahomedan sued his uncles for a share in property the right to which he alleged had descended to him, through his mother (their sister) on the death of their father. *Held* (*on review*), that Art. 123 of Sch. II of the Limitation Act is applicable to the case. The plaintiff claimed through his mother whose right to a share accrued on the death of her father. As this event admittedly occurred more than twelve years before the institution of the suit, the plaintiff's claim was barred by limitation. The words "joint family property" in Sch. II, Art. 141 of the Limitation Act mean the property of a joint Hindu family; and the Article does not apply to families governed by Mahomedan Law. *Amme Raham v. Zia Ahmad* (I. L. R. 13 All., 382) and *Patcha v. Mohidin* (I. L. R. 15 Mad, 57) followed.—SYED SALAR *v.* BHADUR JAMAL KHAN KHAISGY 431

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THEFT OF CROP—*Plea of possession of the land—Declaratory decree—Conclusiveness of such decree in a criminal court—Interference by High Court with finding of acquittal.*] On a charge of theft of paddy from a field, the complainant relied upon judgments that declared his father's title to the field and the accused aduced oral evidence that they were in possession. *Held*, that though in the civil suits evidence on the question of possession was adduced by both parties, yet there was no distinct issue or finding on that point. Therefore the fact that the plaintiff (complainant's father) had obtained a declaration of title was not conclusive proof of his being in possession. The accuseds' plea of possession was therefore a good one, if true, and they were not debarred by the civil judgments from proving it. *Further*, that, as the evidence on the question of possession consisted of oral testimony, and the decision as to the truth or otherwise of the plea depended upon appreciation of evidence, the High Court should not interfere with the order of acquittal made by the Magistrate.—INANDA APPANA *v.* PUTTAPANDA KARIAPPA 465

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VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY—*Against subsequent purchaser—Waiver or abandonment of lien—Separate agreement—Transfer of Property Act not in force in Mysore—Courts of Mysore, Courts of Equity and Good Conscience—Limitation Act (XV of 1877) s. 14 and Sch. II, Art. 111.*] For the balance unpaid of purchase-money of a coffee-estate, an agreement was given by the purchasers to the vendors that delivery of the crop should be given in liquidation at certain fixed rates. Before liquidation of such balance, the purchasers resold the estate, and their vendees again sold it. In these transfers the balance unpaid of the original purchase-money was referred to as an encumbrance on the estate and it was expressly stipulated that the transferees were not to be entitled to the produce until such balance was cleared off. The plaintiff had previously brought a suit against the defendants on the agreement, but it was dismissed on the ground that, being brought before the defendants had defaulted, it was premature. *Held* that as the Transfer of Property Act has not been extended to Mysore, the

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courts of that Province must proceed according to Equity and Good Conscience, and hold that a vendor possesses an equitable lien for unpaid purchase-money against his vendees and sub-purchasers with notice. In the present case, the question must be decided not on the construction of the agreement and original sale-deed alone but upon consideration of all the documents and the terms and conditions of the subsequent transfers, in order to see what was the intention and understanding between the original vendors and vendees and whether the lien was preserved or abandoned. The express reservation of the lien and the transfer of the estate to sub-purchasers with the liability to pay the debts out of the income of the estate prove clearly the intention of the parties from the commencement. There was no security taken in substitution for the lien nor was any bond or covenant taken from a third person. The intention of the original vendors is clear. They expected to get the produce of the estate on which they had their lien till the debt was liquidated. That was their intention and was also the understanding of the vendees and their assignees. It must therefore be *held* that the vendor had not lost his lien on the estate for any money that might be due for unpaid purchase-money under the agreement. *Nairn* v. *Prowse* (6 Ves. 752); *Mackreth* v. *Symmonds* (15 Ves. 329); and the cases noted in Dart (Law of Vendors and Purchasers, ed. 1888, pp. 825—386); Kent (Commentaries, ed. 1889, vol. IV., p. 157); and White and Tudor (Leading Cases in Equity, vol. I., p. 355), distinguished and reviewed. *Held further* that the parties and cause of action in the previous suit being the same as in the present one but the court having no jurisdiction to entertain it because it was premature, the case falls within the purview of the Limitation Act (XV of 1877) s. 14, and the plaintiff is entitled to exclude the period occupied in prosecuting the previous suit. The present suit is therefore within time under Sch. II Art. 111 of the Limitation Act. The Chief Court, differing from the Court below as to the estimation of the amount due to the plaintiff, modified the decree in that respect, and also assessed costs in both courts on the sums allowed and disallowed respectively. *Semble*—Under the Transfer of Property Act, s. 55 cl. 4 (*b*) the vendor has a charge on the land in the hands of the buyer only.—VENKATA KRISHNA SETTY *v.* SYED AMIR ALI SAIB 145

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